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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 278.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS J. LAUGHLIN, ADMINISTRATOR OF MARY LAUGHLIN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 24, 1887.

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1 Know all men by these presents that we, The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, and Alfred L. Dennis, of the city of Newark, in the county of Essex and State of New Jersey, are held and firmly bound unto Thomas J. Loughlin, administrator, &c., of Mary Loughlin, deceased, in the sum of twenty-two thousand dollars, lawful money of the United States of America, to be paid to the said Thomas J. Loughlin, administrator, &c., or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves respectively, heirs, executors, and administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated the twelfth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a circuit court of the United States for the district of New Jersey, in a suit depending in said court between the said Thomas J. Loughlin, administrator, &c., plaintiff, and the said Pennsylvania Railroad Company, defendant, a judgment was rendered against the Pennsylvania Railroad Company and in favor of the said Thomas J. Loughlin, administrator, and so forth, and the said Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas J. Loughlin, administrator, &c., citing and admonishing him to be and appear at a Supreme Court of the

2 United States to be holden at Washington on the second Monday of October next:

Now, the condition of the said obligation is such that if the said Pennsylvania Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PENNSYLVANIA RAILROAD CO.,
By EDMUND SMITH,
First Vice-President.

Attest:
[L. S.]
D. S. NEWHALL,
Ass't Secretary.

A. L. DENNIS. [L. S.]

Signed, sealed, and delivered in the presence of—
ADRIAN SCHARFF.

Witness as to A. L. Dennis:
ADRIAN SCHARFF.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania.

D. S. NEWHALL, being duly sworn according to law, on his oath says that he is the assistant secretary of the Pennsylvania Railroad

Company, the corporation named in the foregoing obligation; that he knows the seal of said company; that the seal affixed to said obligation is the common or corporate seal of said company; that Edmund Smith is the first vice-president of said company; that this deponent saw the said Edmund Smith sign, seal, and deliver
3 said obligation as the voluntary act and deed of said company, he being thereunto duly authorized by a resolution of the board of directors of said company adopted at a meeting of the said board held on the twenty-second day of March, A. D. 1876, and that this deponent signed his name to the same as an attesting witness.

D. S. NEWHALL.

Sworn and subscribed to before me, at Philadelphia, this thirteenth day of May, A. D. 1887.

JNO. C. SIMS, JR.,
[L. S.] *Notary Public.*

Affidavit (Notary).

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

I, William B. Mann, prothonotary of the courts of common plea of said county, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that Jno. C. Sims, Jr., Esquire, before whom the annexed oath or affirmation was made, was at the time of so doing a notary public for the Commonwealth of Pennsylvania, residing in the county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of deeds or conveyances for lands and tenements in the State of Pennsylvania, and to all whose acts as such full faith and credit are and ought to be given, as
4 well in courts of judicature as elsewhere, and that I am well acquainted with the handwriting of the said notary public and verily believe his signature thereto is genuine, and that said oath or affirmation to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 15th day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

WILLIAM B. MANN,
Prothonotary.

STATE OF NEW JERSEY, }
County of Essex, } *ss:*

ALFRED L. DENNIS, of full age, being duly sworn according to law, on his oath says that he executed the foregoing bond; that he resides in the city of Newark and State and county aforesaid, and is the owner of real estate in his own name in fee simple in said State of New Jersey of the value of at least twenty-two thousand

dollars, and that the same is free from any incumbrance. Deponent also says that he is worth at least twenty-two thousand dollars over and above all his debts and liabilities.

A. L. DENNIS.

Sworn and subscribed before me this twelfth day of May, A. D. 1887, at Newark, New Jersey.

ADRIAN SCHARFF,
Master in Chancery of New Jersey.

(Endorsed:) Bond. The Pennsylvania Railroad Company, plaintiffs in error, *vs.* Thomas J. Loughlin, administrator, &c., defendant in error. Dated May 12, 1887. Approved May 14, 1887. L. E. Wales, J.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Thomas J. Laughlin, administrator, &c, of Mary Laughlin, deceased, plaintiff, and The Pennsylvania Railroad Company, defendants, of a plea of trespass on the case, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States shall be done.

The Seal of the U. S. Circuit Court, District of New Jersey.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

S. D. OLIPHANT,
Clerk of the Circuit Court of the United States, District of New Jersey.

Allowed by—
L. E. WALES, *J.*
May 14, 1887.

[Endorsed:] Original. United States Supreme Court. The Pennsylvania Railroad Company, plaintiffs in error, *vs.* Thomas J. Laughlin, administrator, &c., defendant in error. Service of a copy of the within writ of error acknowledge this 17th day of May, A. D. 1887. James A. Dempsey, att'y of pl't'ffs. Writ of error. W. H. Bradley, att'y of pl't'ffs in error. Allowed May 14, 1887.

6 The United States of America to Thomas J. Laughlin, administrator of Mary J. Laughlin, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, wherein The Pennsylvania Railroad Company — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable L. E. Wales, acting judge of the district court of the United States for the district of New Jersey and *ex officio* a judge of the circuit court of the United States for the district of New Jersey, this fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

L. E. WALES, *J.*

[Endorsed:] Original. United States Supreme Court. The Pennsylvania Railroad Company, plaintiffs in error, *vs.* Thomas J. Laughlin, administrator, &c., defendant in error. Citation. W. H. Bradley, att'y of pl't'ffs in error. I hereby acknowledge service of the within citation, a copy of which was left with me this 17th day of May, A. D. 1887. James A. Dempsey, att'y of pl't'ffs.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the —, A. D. 188–.

—— ——.

7 United States Circuit Court, District of New Jersey.

THOMAS J. LOUGHLIN, Administrator of Mary Loughlin, Deceased,
vs.
THE PENNSYLVANIA RAILROAD COMPANY.
} In Case. Judgment.

JAMES A. DEMPSEY, *Attorney.*

As yet of the fifteenth day of June, eighteen hundred and eighty-five.

LEONARD E. WALES, *Judge.*

Witness:
S. D. OLIPHANT, *Clerk.*

UNITED STATES OF AMERICA, *District of New Jersey*, } *ss:*

8 ESSEX COUNTY, *ss:*

[L. S.] The State of New Jersey to the sheriff of the county of Essex aforesaid, Greeting:

You are hereby commanded to summon The Pennsylvania Railroad Company, if in your county they may be found, so that they be and appear before our inferior court of common pleas to be holden at Newark and for the said county of Essex on the fifteenth day of June instant, to answer unto Thomas J. Loughlin, administrator of all and singular the goods and chattels, rights and credits, of Mary Loughlin, deceased, in a plea of trespass on the case to his damage fifty thousand dollars, as is said, and have you then and there this writ.

Witness Andrew Kirkpatrick, Esquire, presiding judge of our said inferior court of common pleas, at Newark aforesaid, the third day of June, in the year one thousand eight hundred and eighty-five.

J. WARREN VANDERVEER, *Clerk.*

JAMES A. DEMPSEY, *Attorney.*

9 (Endorsement:) Essex common pleas. Thomas J. Loughlin, adm'r, etc., *v.* The Pennsylvania Railroad Comany. In trespass on the case. Summons. Ret'ble June 15th, 1885. James A. Dempsey, att'y. Summoned June 5th, 1885. Wm. H. Brown, sheriff, by Cyrus Benedict, under sheriff. Sheriff's fees, 2.12.

Essex County Inferior Court of Common Pleas, of the Fifteenth Day of June, Eighteen Hundred and Eighty-Five.

ESSEX COUNTY, *ss:*

The Pennsylvania Railroad Company, the defendant in this suit, was summoned to answer unto Thomas J. Loughlin, administrator of the goods and chattels, rights and credits, which were of Mary Loughlin, deceased, the plaintiff therein, of a plea of trespass on the case, and thereupon the plaintiff, by James A. Dempsey, his attorney, complains for that whereas the said defendant, before and at the time of committing the grievances hereinafter complained of, to wit, on the twenty-first day of September, eighteen hundred and eighty-four, was the possessor, operator, and manager of a certain railroad constructed over, upon, and across a certain public street and highway at Newark, in the county of Essex aforesaid, which said public street and highway is known as Market street, said
10 highway running from east to west across said railroad, and along which highway the said Mary Loughlin, deceased, was then and there lawfully travelling from east to west, and the said defendant was then and there possessed of, operating, and navigating certain locomotive engines propelled by steam and certain cars drawn thereby over and upon said railroad and then and there running on said railroad from Jersey City, Hudson county, New Jersey,

to Newark, in said county of Essex, and over and across said public highway and on a level therewith.

And plaintiff avers that the said public street or highway known as Market street as aforesaid is crossed by a large number of tracks belonging to said railroad and used in connection therewith by the defendant in operating said railroad and on which the said defendant did run and cause to be run its engines, coaches, and cars; and plaintiff avers that the said crossing at the place aforesaid, to wit, on the day and year last aforesaid, was extremely dangerous to persons and vehicles then and there passing along said Market street by reason of the number of engines, coaches, and cars which were constantly passing over the easterly and westerly tracks of said railroad crossing said Market street, said engines, coaches, and cars running to and from Jersey City aforesaid through the said city of Newark and over said Market street; and plaintiff avers that the said defendant could only have made the said crossing safe for
11 the passage of passengers, horses, carriages, and other vehicles travelling and going along said Market street at the place aforesaid by providing and causing flagmen and other servants to be thereat stationed to give warning to persons or vehicles approaching or passing thereon and by erecting gates or other obstructions across said Market street at said crossing and keeping the same closed and put up during the passage of said engines, coaches, and cars over and upon said railroad at said crossing, and by ringing a bell or blowing a whistle, which is required by law to be placed on every engine run and operated on said railroad and rung and blown at and before approaching the said crossing, and by the defendant using every other lawful, safe, and prudent method of notifying the public of the approach of said engines, coaches, and cars over and upon said railroad at said crossing.

And plaintiff avers that the said defendant was then and there possessed of a certain locomotive engine propelled by steam and of certain carriages, coaches, and cars designed to be drawn and propelled by said engine upon and over the tracks of said railroad from said Jersey City through the said city of Newark and across said Market street, and which said engine, carriages, coaches, and cars were then and there under the care, government, and management of a certain then servant or servants of the said defendant who were then and there propelling and running the said engine, carriages,
and cars over and upon the said tracks of the said railroad
12 and over said crossing in pursuance of and in accordance with certain directions, orders, and instructions then and there received and had by said servant or servants of and from said defendant, to wit, on the day and year last aforesaid, at Newark aforesaid.

And plaintiff avers that on the day and year last aforesaid, at Newark aforesaid, the said Mary Loughlin was riding in a certain car drawn by horses along said public street or highway known as Market street as aforesaid and approaching said crossing and intending to go upon and across the said tracks of the said railroad, and then and there got upon the track of the said railroad at the crossing aforesaid, as she lawfully might, and without any negligence or

fault on her part, when the defendant, with its engines, coaches, and cars propelled by steam, approached and came upon said crossing without having given or caused to be given any warning of the approach of the said engines, coaches, and cars and without having any flagmen or other servants then and there stationed to warn persons of their approach and without ringing the bell or blowing the whistle which was then and there placed upon the said engine that was then and there propelling the said coaches and cars and without having any gates or other obstructions over and across the said street called Market street at the place aforesaid, or any other lawful, safe, and prudent method of notifying the public of the approach of the said engines, coaches, and cars, and the said defendant
13 then and there, by its servants in charge of its said engines, cars, and coaches, so carelessly and improperly managed, moved, and conducted the same that by and through the carelessness, negligence, and improper conduct of the said defendant, by its said servants in that behalf, the said engine and the said cars propelled thereby of the said defendant then and there with great force and violence ran foul of and struck against a certain horse car or carriage drawn by horses, which horse car or carriage was then and there being lawfully drawn across the track of the said railroad company, in Market street, in said city of Newark, and in which horse car or carriage drawn by horses the said Mary Loughlin was then and there lawfully a passenger, to wit, at Newark aforesaid, to wit, on the twenty-first day of September last aforesaid, and thereby and by reason of said engines and cars running foul of and striking against said horse car or carriage as aforesaid the said Mary Loughlin was violently thrown from said horse car or carriage to the ground, when the said engine, coaches, and cars ran and struck with great force and violence upon and against the said Mary Loughlin, and by reason of the bruises, hurts, and wounds thereby caused the said Mary Loughlin was so injured that she died, to wit, on the twenty-second day of September, in the year last aforesaid, at Newark aforesaid.

And plaintiff avers that on the twenty-first day of Septem-
14 ber, in the year last aforesaid, at Newark aforesaid, the said Mary Loughlin was riding in a certain car drawn by horses along said public street or highway known as Market street as aforesaid and approaching said crossing and intending to go upon and across the said track of the said railroad, and then and there got upon the track of the said railroad at the crossing aforesaid, as she lawfully might, and without any negligence or fault on her part, when the engines, coaches, and cars of the said defendant which were then and there improperly, negligently, carelessly, and unskillfully managed and conducted by the then servant or servants of the said defendant then and there with great force and violence ran and struck upon and against the said Mary Loughlin, and by reason of the bruises, hurts, and wounds thereby caused the said Mary Loughlin was so injured that she died, to wit, on the twenty-second day of September, in the year last aforesaid, at Newark aforesaid.

And plaintiff avers that as the administrator of the effects of the

said Mary Loughlin by means of the premises — was forced to pay, lay out, and expend divers large sums of money, to wit, the sum of one thousand dollars, in and about the proper, decent, and appropriate burial of the said Mary Loughlin, and that the next of kin of the said Mary Loughlin have by reason of the premises sustained and suffered great loss, injury, and damage, to wit, the sum of fifty thousand dollars.

15 Whereby and by force of the statute in such case made and provided an action has accrued to the plaintiff as administrator of the goods, chattels, and effects of the said Mary Loughlin for exclusive benefit of the next of kin of the said Mary Loughlin, deceased, to demand and have of and from the said defendant the said several sums of money above mentioned in manner and form as is above demanded, and therefore he brings his suit, &c.

And the said plaintiff brings into court here the letters of administration granted to the plaintiff of the goods and chattels, rights and credits, of the said Mary Loughlin, deceased, by Joseph L. Munn, the surrogate of the said county of Essex, which gives sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day in the year therein named, to wit, the twenty-seventh day of May, eighteen hundred and eighty-five.

JAMES A. DEMPSEY,
Att'y of Pl't'ff.

(Endorsement:) Essex county court of common pleas. Thomas J. Loughlin, adm'r, &c., *vs.* The Penna. Railroad Company. In trespass on case. Declaration. James A. Dempsey, att'y of pl't'ff. Filed Jul- 7, 1885. J. Warren Vanderveer, clerk.

16 Essex County Inferior Court of Common Pleas.

THE PENNSYLVANIA RAILROAD COMPANY, Def't,
ads.
THOMAS J. LOUGHLIN, Adm'r, &c., Pl't'ff. } In Case.

And the said defendant, The Pennsylvania Railroad Company, by William H. Bradley, its attorney, comes and defends the wrong and injury when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it; and of this it, the said defendant, puts itself upon the country, &c.

WILLIAM H. BRADLEY,
Attorney for Defendant.

STATE OF NEW JERSEY,
County of Hudson, } *ss:*

JOSEPH CRAWFORD, of Hudson county, New Jersey, of full age, being duly sworn according to law, on his oath saith that the defendant in the foregoing plea mentioned is a corporation of another

State than New Jersey, namely, of the State of Pennsylvania,
17 and that he, this deponent, is superintendent and agent of its lines in New Jersey; that the said plea is not intended for the purpose of delay, and that he verily believes that the said defendant has a just and legal defense to said action on the merits of the case.

JOS. CRAWFORD.

Sworn and subscribed before me at Jersey City this thirteenth day of August, A. D. 1885.

ADRIAN SCHARFF,
Master in Chancery of New Jersey.

(Endorsement:) Essex county common pleas. The Pennsylvania R. R. Co., def't, *ads.* Thomas J. Loughlin, adm'r, &c., pl'tff. In case. Pleas, &c. W. H. Bradley, att'y. Filed Aug. 13, 1885. J. Warren Vanderveer, clerk.

And the plaintiff doth the like.

THOMAS J. LOUGHLIN, Adm'r, &c.,
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } In Trespass on Case.

Take notice of the trial of the issue joined in this cause before our inferior court of common pleas to be holden at Newark, in
18 and for the county of Essex, on the second Tuesday of September next, at ten o'clock in the forenoon, or as soon thereafter as the said court can attend to the same.

Dated August 14th, 1885.

Yours respectfully, JAMES A. DEMPSEY, *Attorney.*

To Wm. H. Bradley, Esq., attorney of defendant, or whom it may concern.

(Endorsement:) Essex county court of common pleas. Thomas J. Loughlin, adm'r, &c., *vs.* The Penna. R. R. Co. In case. Notice of trial. James A. Dempsey, pl'tff's attorney. Filed Sept. 2, 1885. J. Warren Vanverveer, clerk.

Essex County Inferior Court of Common Pleas, State of New Jersey.

THOMAS J. LOUGHLIN, Administrator, &c., of Mary Loughlin,
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } In Case. Petition for Removal to the Circuit Court of the United States, District of New Jersey.

To the said inferior court of common pleas:

19 Your petitioner, The Pennsylvania Railroad Company, respectfully shows to this honorable court that the matter in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that your petitioner was

at the time of the commencement of this suit and still is a citizen of the State of Pennsylvania, and that the said Thomas J. Loughlin was then and still is a citizen of the State of New Jersey; that the said Thomas J. Loughlin was appointed administrator of all and singular the goods and chattels, rights and credits, of Mary Loughlin, deceased, by the surrogate of the county of Essex, in said State of New Jersey, before the time of the commencement of this suit and still is such administrator; that the said The Pennsylvania Railroad Company was created, organized, and has existed and now exists exclusively under and by virtue of the laws of the State of Pennsylvania and was located and doing business in that State at the time of the commencement of this suit, and is now so located and doing business in the State of Pennsylvania, and that the said Mary Loughlin at the time of her death was a citizen of the State of New Jersey.

Your petitioner herewith offers a bond with good and sufficient security for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully and improperly removed thereto.

Your petitioner also prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said security and bond and to cause the record herein to be removed into said circuit court of the United States in and for the district of New Jersey.

And your petitioner will ever pray, &c.

THE PENNSYLVANIA RAILROAD CO.,
By EDWIN A. SMITH, *First Vice-President.*

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

EDWARD SMITH, being duly sworn according to law, on his oath says that he is first vice-president of the Pennsylvania Railroad Company; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations contained therein are true.

EDWIN A. SMITH.

Sworn and subscribed before me this 8th day of September, A. D. 1885.

A. P. BURCHELL,
[L. S.] *Notary Public.*

(*Affidavit.*)

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William B. Mann, prothonotary of the court of common pleas of said county, the same being a court of record, do certify that A. P. Burchell, Esquire, before whom the annexed affidavit was made, was at the time of so doing a notary public for the Commonwealth

of Pennsylvania, residing in the county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgements, etc., and to all whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that I am well acquainted with the handwriting of the said notary public and verily believe his signature thereto is genuine, and that said affidavit purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 8th day of Sept'r, in the year of our Lord one thousand eight hundred and eighty-five.

WILLIAM B. MANN,
[L. S.] *Prothonotary.*

Know all men by these presents that The Pennsylvania Rail-
22 road Company, of the State of Pennsylvania, as principal; Elisha B. Gaddis, of the city of Newark, in the county of Essex and State of New Jersey, as surety, are held and firmly bound unto Thomas J. Loughlin, administrator, &c., of Mary Loughlin, deceased, of the city of Newark, in the county of Essex and State of New Jersey, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Thomas J. Loughlin, administrator as aforesaid, or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, they bind themselves, their successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with their seals and dated the eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five. Yet upon these conditions: The said The Pennsylvania Railroad Company having petitioned the Essex county inferior court of common pleas, State of New Jersey, for the removal of a certain cause therein pending, wherein Thomas J. Loughlin, administrator, &c., of Mary Loughlin, deceased, is plaintiff, and the said The Pennsylvania Railroad Company is defendant (the same being an action of trespass on the case), to the circuit court of the United States in and for the district of New Jersey:

Now, — the Pennsylvania railroad, the petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and
23 truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be and remain in full force and virtue.

In witness whereof the said The Pennsylvania Railroad Company hath hereto set its seal and caused this bond to be signed by its first vice-president and the said Elisha B. Gaddis hath also set his hand and seal the day and year first above written.

THE PENNSYLVANIA RAILROAD CO.,
By EDWIN A. SMITH,
[L. S.] *First Vice-President.*
Attest: JNO. C. SIMS, JR., *Secretary.*

Signed, sealed, and delivered in the presence of—
JNO. C. SIMS, JR.

E. B. GADDIS. [L. S.]

Witness as to Elisha B. Gaddis:
HOWARD W. HARPS.

STATE of NEW JERSEY, } ss:
County of Essex, }

ELISHA B. GADDIS, of full age, being duly sworn according to law, on his oath says that he executed the foregoing bond; that
24 he resides in Newark, in the State of New Jersey aforesaid, and is the owner of real estate in his own name in fee simple in Newark of the value of at least two thousand dollars, and that the same is free from any incumbrance. Deponent also saith that he is worth at least two thousand dollars over and above all his debts and liabilities.

E. B. GADDIS.

Sworn and subscribed this ninth day of September, A. D. 1885, at Newark, N. J., before me—

EDWARD W. HAYES,
Master in Chancery in New Jersey.

(Endorsement:) Bond. The Pennsylvania Railroad Company and Elisha B. Gaddis to Thomas J. Loughlin, administrator. Dated September 8th, 1885. This bond is approved. Andrew Kirkpatrick, J. Filed Sept. 9, 1885. J. Warren Vanderveer, clerk.

STATE OF NEW JERSEY:

Essex County Inferior Court of Common Pleas.

THOMAS J. LOUGHLIN, Administrator, &c., of Mary Loughlin, Dec'd, } In Case.
vs.
25 THE PENNSYLVANIA RAILROAD COMPANY. }

It appearing that the defendant in the above case has filed a petition and bond for the removal of the same into the United States circuit court for the district of New Jersey—

It is on this ninth day of September, A. D. 1885, ordered that the said petition and bond be accepted & all further proceedings in this court be stayed.

ANDREW KIRKPATRICK, *P. J.*
JOHN L. JOHNSON.

On motion of—
W. H. BRADLEY,
Att'y of Defendant.

(Endorsment:) Essex common pleas. Thomas J. Loughlin, administrator, *vs.* Pennsylvania Railroad Company. On case. Order removing cause. W. H. Bradley, att'y. Filed Sept. 9, 1885. J. Warren Vanderveer, clerk.

STATE OF NEW JERSEY, } ss:
County of Essex, }

I, J. Warren Vanderveer, clerk of the inferior court of common pleas of the State of New Jersey, holden at Newark, in and for the county of Essex, do hereby certify the foregoing to be true and correct copies of the summons, declaration, plea, notice of trial, petition for removal, bond, and order in the case of Thomas J. Loughlin against The Pennsylvania Railroad Company, in an action
26 of trespass on the case, as the same is taken from and compared with the originals now on the files of my office.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said court, at Newark, this fifteenth day of September, A. D. eighteen hundred and eighty-five.

J. WARREN VANDERVEER, *Clerk.*

(Endorsed:) Essex county inferior court of common pleas. Thomas J. Loughlin, adm'r, *vs.* The Pennsylvania Railroad Company. Transcript of proceedings. Filed Sep. 21, 1885. S. D. Oliphant, clerk.

27 United States Circuit Court for the District of New Jersey.

THOMAS J. LOUGHLIN, Administrator, etc., of Mary Loughlin, Deceased,
vs.
THE PENNSYLVANIA R. R. Co. } In Case.

Application having been made before me by W. H. Bradley, attorney of defendant in above-stated cause, within four days after the verdict therein, for a rule to show cause why a new trial should not be granted on the ground that the damages are excessive and the verdict contrary to the weight of evidence and charge of the court, I do hereby grant said rule, saving and reserving unto said defendant all exceptions taken at the trial of said cause.

And it is ordered that all further proceedings in said cause be stayed until further order of this court.

(Endorsed:) United States circuit court for the district of New Jersey. Thomas J. Loughlin, adm'r, etc., *vs.* The Pennsylvania R. R. Co. In case. Rule, etc. Filed Nov. 1, 1886. S. D. Oliphant, clerk. W. H. Bradley, att'y of defendants. Presented & heard November 1, 1886, L. E. W.

28 United States Circuit Court, District of New Jersey.

THOMAS J. LOUGHLIN, Adm'r, etc.,
vs.
THE PENNSYLVANIA R. R. Co. } Rule.

I have considered the reasons assigned for a new trial in the above case with much care.

The jury were to assess the pecuniary value of a mother's life to

her surviving children who were of a very tender age at the time of her death, and will require for several years material care and vigilance in training their mental and moral faculties and in guarding their health. The jury was cautioned not to let their judgment be affected by sympathy or by the fact that the defendant was a powerful and wealthy corporation, yet after a deliberation of several hours they returned a verdict for the plaintiff for fifteen thousand dollars.

I have felt reluctant to disturb the finding of the jury, but as I am of the opinion that the amount of the verdict is somewhat excessive in view of the fact that it would be more than sufficient to provide for all the necessary wants of the children of the deceased until arriving at adult age, and taking into consideration the uncertainty of their living until that time, I have concluded to enter an order making the rule for a new trial absolute unless the plaintiff will release all of the verdict above ten thousand dollars within twenty days after notice of this order to his counsel and accept a judgment for that sum ($10,000). On the filing of the plaintiff's release and acceptance within the time specified the rule will be discharged; otherwise made absolute.

L. E. WALES, *J.*

(Endorsed:) U. S. circuit court, district of New Jersey. Thomas J. Loughlin, adm., *vs.* The Pennsylvania Railroad. Order. Filed March 3, 1887. S. D. Oliphant, clerk.

29 United States Circuit Court, District of New Jersey.

THOMAS J. LOUGHLIN, Am'r of Mary Loughlin, Dec'd,
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } In Case.

Know all men by these presents that I, Thomas J. Loughlin, administrator of the estate of Mary Loughlin, deceased, plaintiff in the above-stated suit, do hereby, in compliance with the condition prescribed in the order of the court, filed March 3, 1887, upon the motion for new trial and for a valuable consideration me moving thereto, release unto the said defendant all of the verdict rendered therein above the sum of ten thousand dollars, and do agree to accept judgment for that amount in full of said verdict.

Witness my hand and seal this seventeenth day of March, one thousand eight hundred and eighty-seven.

THOMAS J. LOUGHLIN, [L. S.]
Administrator, &c.

Sealed and delivered in the presence of—
WM. J. KEARNS.

(Endorsed:) U. S. circuit court, dist. of New Jersey. Thomas J. Loughlin, adm'r, &c., *vs.* The Penna. R. R. Co. In case. Release & acceptance. James A. Dempsey, att'y of pl't'ff. Filed Mar. 22, 1887. S. D. Oliphant, clerk.

30 United States Circuit Court, District of New Jersey.

THOMAS J. LOUGHLIN, Adm'r, &c.,
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } In Case.

The plaintiff having filed his release and acceptance in conformity with the order of this court made on the third day of March instant discharging so much of the verdict rendered as exceeds ten thousand dollars and agreeing to accept that sum in lieu thereof, it is now, on motion of James A. Dempsey, attorney of the plaintiff, ordered that the rule to show cause why a new trial should not be had be, and the same is hereby, discharged with costs, and judgment final is hereby rendered in favor of the plaintiff and against the defendant for the sum of ten thousand dollars and costs of suit, said judgment to be entered as of the day of the rendition of said verdict.

Dated March 17, 1887.

LEONARD E. WALES, *J.*

(Endorsed:) U. S. circuit court, dist. of New Jersey. Thomas J. Loughlin, adm'r, &c., *vs.* The Penna. R. R. Co. In case. Order refusing new trial, &c. James A. Dempsey, att'y of pl't'ff. Filed Mar. 22, 1887. S. D. Oliphant, clerk.

31 Afterwards, that is to say, on the twenty-fifth day of October, in the year eighteen hundred and eighty-six, in the term of September, 1886, before the said circuit court, at Trenton, in said district, comes as well the said plaintiff as the said defendant, by their respective attorneys, within mentioned, and the jurors of the jury, between the parties aforesaid, in the plea aforesaid, being also summoned, come who to speak the truth of the matters and things within contained, being chosen, tried, and sworn, say upon their oath, that the said defendant is guilty of the premises within laid to its charge, in manner and form as the said plaintiff has within complained against it, and they assess the damages of the said plaintiff by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, to fifteen thousand dollars, and for those costs and charges to —; and the court being of opinion that the aforesaid verdict is excessive, and that said verdict should be set aside and a new trial be had, unless the plaintiff remit the sum of five thousand dollars of said verdict, and the said plaintiff having remitted the said sum of five thousand dollars and accepted the sum of ten thousand dollars as said verdict:

32 Therefore it is considered that the said Thomas J. Loughlin, administrator as aforesaid, plaintiff, do recover against the said The Pennsylvania Railroad Company, defendant, his damages aforesaid, in form aforesaid, assessed to the sum of ten thousand dollars, and also — for his costs and charges by the court now here adjudged to the said plaintiff, and with his assent, which said damages, costs, and charges in the whole amount to —; and the defendant in mercy.

Judgment signed March 22, 1887.

L. E. WALES, *Judge.*

33 United States Circuit Court, District of New Jersey.

THOMAS J. LAUGHLIN, Administrator, &c., of Mary Laughlin, Dec'd,
vs.
THE PENNA. R. R. Co.

In Case.
Bill of Exceptions.

James A. Dempsey, att'y of plaintiff.
W. H. Bradley, att'y of defendant.

This cause came on to be tried on the issue joined between the parties on the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and eighty-six, before his honor Leonard E. Wales, Esq., judge of the said circuit court, by a jury duly empanneled and sworn to try the said issue, and thereupon the plaintiff, in support of the issues joined, offered to prove—

The plaintiff offered to prove by himself that the deceased, Mary Laughlin, performed the duties of a good and capable mother towards her two children in their nurture and in their moral, intellectual, and physical training.

Whereupon the counsel on the part of the said defendant interposed and insisted that the said evidence so offered to be given by the said plaintiff was not good or admissible in law upon the issue aforesaid, but his honor, the said justice, held and affirmed that the said evidence so offered to be given by the said plaintiff as
34 aforesaid was good and admissible in law, and thereupon the said plaintiff testified as follows:

Question by plaintiff's counsel. Your wife left two children, I believe?

A. Yes, sir.

Q. What were they, boys or girls?

A. One of them was a boy and the other a girl.

Q. Will you give their names and their ages?

A. Their names are Willie I. Laughlin and Louisa M. Laughlin.

Q. And their ages at that time?

A. They were — years old and 5½.

Q. William being 8?

A. Yes, sir; and the girl five and a half.

Q. I will ask you, sir, the question already put in relation to Mrs. Laughlin, and you can answer it point by point. Did the deceased perform the duties of nurture to these children—of their intellectual, moral, and physical training? Did she educate them? What was her character and capacity in these respects? The first branch of the question is, How did she perform the duties of nurture?

A. In every way becoming a good mother; attentive to her children at all times.

Q. Now, as to their intellectual training?

A. When they became of a sufficient age to be educated, every night after tea or nearly every night, when her leisure from other duties would permit her, she would take them to her and give
35 them such education as their minds were fit to receive. She taught them the rudiments of simple education. They were

not old, as you know, and she took an interest in having them become well educated.

Q. Now, as to their moral training?

A. It was good, sir, in every way.

Q. Was she their instructress in morals and education?

A. She was their instructress in morals and she was a good instructor in religion—attended to their little religious duties as a good mother would.

Q. Now, as to their physical training?

A. She took care of them.

Q. Did she see to their health?

A. Yes, sir; when they were sick she was anxious about them and took good care of them.

Q. What was the result of this physical training—were they healthy children?

A. They were very; both of them fine children of their age.

Q. Now, I ask you the last branch of the question. What was her character and capacity in these respects—the discharge of these maternal duties?

A. Her ability to perform the duty of good mother was great—her ability was good and her moral character was above reproach.

Q. In this respect of maternity?

A. They were good—her abilities were good.

To which ruling of his honor the said justice in admitting
36 the said testimony the defendant prayed a bill of exception, and his honor the said justice sealed the exception accordingly.

LEONARD E. WALES, *J.* [L. S.]

The testimony in the cause having been concluded and the parties having rested the cause, the defendant requested his honor the said justice to charge the jury that "the obligation at any time to keep a flagman at a crossing over a street or highway arises out of and depends upon the degree of danger to which persons are exposed who have occasion to cross the railroad in using the street or highway; that this accident occurred on Sunday evening after ten o'clock, and the evidence shows that the traffic and travel on the street on Sundays at that hour are not so great nor the running of trains so frequent as to require defendant to keep a flagman there."

Also that if the defendant at the time of the occurrence in question had a flagman at this crossing in a proper position and at such a time as to give to persons in the roadway about to cross the track sufficient notice of the approaching train everything that was required of the defendant was done, and in such case the question of the speed of the train and of signals across the sidewalk or elsewhere becomes immaterial.

Also that "the evidence shows that when the engineer of
37 the colliding train came in sight of the crossing the east-bound train was coming out of the station and the street car was standing at some distance from the track, and it was his right to suppose that under such circumstances the driver would not attempt

to cross before the train, and if he acted upon that impression it was not negligence on his part, although the supposition proved to be groundless."

Also that "notwithstanding the death of the mother the father remained bound to provide for his children suitable care, nurture, and education; and, in estimating the damages founded on a supposed pecuniary loss sustained by the children by being deprived of the peculiar care, education, and nurture which a mother could have bestowed, the jury must take into consideration that it is the father's duty to take all proper means to supply such loss, and damages can only be recovered in respect of such loss as cannot be supplied by the father and others employed by him."

His honor the said justice declined to charge as above requested; whereupon the counsel for the defendant, conceiving that by the law of the land the said justice should have charged and instructed the jury as above requested, prayed that his honor the said justice would set his hand and seal to this bill of exceptions to the said opinion of his honor the said justice; and whereupon it was sealed accordingly.

38 Excepting in so far as the matters set forth in the said requests were passed upon in the said charge.

LEONARD E. WALES, *J.* [L. S.]

And his honor the said justice thereupon proceeded to charge the said jury as follows:

GENTLEMEN OF THE JURY: The plaintiff has brought this action against the defendant to recover damages for the loss resulting from the death of Mary Laughlin, which it is alleged was caused by the negligence of the defendant.

The right to bring this action is given by a law of the State of New Jersey, which—so much of it as relates to the present case—reads as follows:

SEC. 1st. "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof, then and in any such case the person who or the corporation which would have been liable if death had not ensued shall be liable for an action for damages."

SEC. 2nd. "Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be dis-

39 tributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person." Revised Statutes of New Jersey, 294.

On the 21st of September, 1884, at about twenty minutes past ten o'clock at night, the defendant's train No. 241, bound from Jersey City to Perth Amboy Junction, while crossing Market St., in the city of Newark, came into collision with a horse car which was passing over the same street at a right angle with the defendant's tracks.

The engine of the train struck the left side of the rear of the car and threw it half around against the curb of the sidewalk. Mrs. Laughlin, who was a passenger in the horse car, was thrown out and received such injuries as caused her death in a few hours.

The first question to be decided by you is, Was the accident which resulted in the death of Mrs. Laughlin caused by the defendant's negligence? To properly determine this question you will have to consider—

1st. Whether the train just before the collision had been runing at an excessively high or unusual rate of speed amounting to negligence or recklessness under all the circumstances.

2nd. Whether the proper and customary warning signals
40 of the approach of the train had been made by head-light and bell or steam-whistle on the engine.

3rd. Whether the defendant's agents employed at the crossing to lower the gate bars at the side tracks for the protection of pedestrians and to notify the drivers of vehicles when trains were coming were prompt and careful in the discharge of their duties on this occasion.

No. 241 was a regular way train. It had been running on the same schedule for some months previous, and its time for leaving Newark on its western route was twenty minutes past ten. On the night of the accident the train was about on time, according to the testimony of the engineer and conductor, but you will have to consider with some care in this connection whether it was even a few seconds behind time and in consequence thereof was going at a greater rate of speed than usual just before it reached the crossing, for it is obvious the higher the rate of speed the longer will be the time required to bring this train to a standstill. This train consisted of seven coaches, and started from Jersey City with 327 passengers. It had already made two stoppings, one at Marion and the other at East Newark, before the moment of the collision.

To the east of the crossing, at the distance of 946 feet and 10 inches, there is a draw-bridge over the Passaic river. At the nearer distance of 582 feet and 8 inches there is another bridge over the
Morris canal, and between the latter bridge and Market street
41 are two streets, named respectively River and Commerce, the latter being distant from the crossing 288 feet.

In investigating this branch of the inquiry you will remember the statement of the engineer in reference to the rates of speed at which he passed those different points.

We will not recapitulate them, and only call your attention to them in order that you may calculate as accurately as possible the actual speed of the train from the Passaic bridge to Market street.

The engineer admits that he was running at not less than ten miles an hour at Commerce street. The testimony of plaintiff's witnesses makes it greater, and one test of the defendant's negli-

gence may be applied just here, to wit, whether, in approaching a crowded thoroughfare like the Market-street station, the engineer had his train under sufficient control to check its speed in obedience to the signal of the flagman and to avoid coming into collision with horses or vehicles which were passing or about to pass directly across his track, for the rule must be constantly kept in view that trains, in going through large and populous towns and cities and in crossing streets, should be run with much greater care and at a slower rate of speed than when in open country, where there is much less travel and where they can be seen and heard for greater distances.

Extra danger calls for extra precaution.

42 It must also be observed that the defendant had no right to the exclusive or even to the first or paramount use of the street on which its tracks are laid. The public are entitled to a concurrent and equal use with the defendant. It follows from this that both the agents of the railroad company and those who cross the railroad tracks must exercise all proper and necessary precaution to prevent collisions, and the general rule is that where a person has been injured by the negligence of the company was also in fault by contributing to the wrong or injury by his own want of care he cannot recover; but the present case does not require the application of this rule, and you are not to balance the want of care of the driver of the horse car, if there was such fault on his part, against the negligence of the defendant, if any such negligence has been proved.

It is enough for you to know that Mrs. Laughlin was innocent of all fault. She had no control over the driver, and his wrong, if any there was, cannot be imputed to her. The conduct of the driver must be entirely excluded from your consideration, so far as it concerns the right of recovery by the plaintiff. This is admitted by counsel on both sides and is not open to controversy. The negligence of the defendant is alone in dispute.

Railroad companies are invested with great and valuable privileges and rights, and in consideration of this and of the great

43 speed and inevitable power of their trains they are held to a high degree of care and prudence in operating their roads. They operate them through their agents or servants, and are responsible for their acts. If one of these agents or servants fails in his duty, and by his neglect or carelessness or incompetency a wrong or injury is inflicted upon another, the company whose agent has been thus derelict is liable for the consequences.

2nd. Next, was the head-light of the locomotive visible at such a distance east of the crossing and was the bell rung or the whistle blown in time to notify all persons at that place that the train was coming so that they could avoid danger?

The testimony on this point is conflicting and contradictory, and the question must be decided by you on the preponderating weight of evidence and the probabilities of what actually occurred. There is no doubt that the engine was provided with a head-light; whether or not that light could be and was seen at a sufficient distance from

the crossing to be of service as a signal on the night of the accident is a subject about which the witnesses differed. An east-bound train had just left the Newark station, and the rear car was passing Commerce street when the engine of No. 241 reached that point, and how far, if at all, the head-light of the latter was intercepted by the outgoing trains and by other obstacles mentioned by the witnesses it will be for you to determine. If the head-light of the rapidly ap-
44 proaching locomotive is seen but a short distance away from a street-crossing it would be more likely to bewilder and alarm than to give time to escape it. So with reference to the ringing of the bell and the sound of the steam-whistle; these signals should also be given in time to be of service. On these matters you have positive as well as negative testimony.

Watchful observers see many things that more inattentive persons do not notice, and some persons hear and distinguish sounds more quickly than others, and therefore the direct testimony of the witnesses who saw and heard these signals may be as much, if not more, entitled to credit than others who said they neither saw nor heard them.

And this brings us to a third branch of inquiry as to negligence, namely, the acts or omissions of the flagman, Lutz, who was stationed at the Market-street crossing.

It may be remarked here that if all the precautions already mentioned were adopted and used by the defendant company in running its trains, and the necessary number of flagmen were employed at the crossing to keep the track clear, it makes little or no difference how great the rate of speed at which the train was run, provided the public had sufficient warning of its approach.

If, in the face of such warning, a person ventures across the track he will take all the risk of danger and the company will not be liable.

Now, Lutz's own statements of what he did just previous to
45 the accident are for the most part irreconcilable with the testimony of the plaintiff's witnesses, with one material exception, to be alluded to presently.

He had charge of the whole crossing from and after ten o'clock on the night of the accident, having gone on duty at 7 o'clock the same evening. Up to 10 o'clock there had been two flagmen at the crossing; after that hour Lutz was left in charge alone.

There are two tracks here, called respectively the east and west tracks, and the flagman who had charge of the west track had gone off duty at 10 o'clock, thus leaving Lutz to attend to both. According to his own testimony he had just flagged the east-bound train out of the station and crossed over to the west track and looked along it to watch for the train, and no sooner did he see the shine of the head-light than he took his lantern and started to flag when he saw the horse car going down, and he halloed as loud as he could. At that time he says the car was from 25 to 30 feet away from the track. Some foot passengers ran across the track, and some remained back, and after they had stopped going over he looked over towards the depot side again, and the first thing he saw was the horse car start right down and stop at the track the same as if

stationed there. "The horse car was right on the track, and the horses inside here." He ran up to the car and said, "For God's sake drive up as fast as you can; for God's sake drive up or you will kill every passenger you have got in your car." Then he (the driver) looked at me and said, Shall I drive up? So he happened to
46 drive along, and the first thing the locomotive came and struck the hind part here; he didn't get all the way across.

This statement appears to be intrinsically improbable and is contradicted by the driver of the car which was struck and by the driver of another horse car that had driven up a few feet behind it.

James McDonough, who was the driver of the car that was struck and who had had seven years' experience as a car-driver prior to the accident and is still in the same occupation, testifies that when he approached the defendant's track he stopped his horses about 20 feet away, as he usually did, and the conductor went ahead and out between the tracks of the defendant. He received his signal after the east-bound train had gone out, "All right to go on." He saw the flagman Lutz go to the shanty on the left and lay his lantern down. McDonough then started his horses on a walk, but before he cleared the west-bound track heard the whistle and saw the flash of the head-light at the same time, and the car was struck. He swears that he never halted on the track. McDonough's statements are corrobated by John Gade, the driver of the car directly behind McDonough's, and of James A. Shannon, the conductor. Hoey, the conductor of McDonough's car, has died since the accident. The supposition that an experienced driver would or did stop his car a single moment on the defendant's tracks at such a dangerous crossing where trains are dashing past every few minutes is
47 almost too improbable for belief, and yet you must take and weigh the testimony, not only in regard to this, but in reference to the other statements of Lutz and to the whole of his conduct on that occasion, and place the credit where you think it is due.

Lutz is, however, sustained in one respect. He had ceased to wave his white lantern, the signal that a train is coming, and he had left his red lantern, the signal of danger to an approaching train, at his shanty, and had not time to run and get it. It is possible, nay probable, that if the red signal had been shown to the engineer of the west-bound train the accident would have been prevented.

We have called your special attention to this portion of the testimony because it is, perhaps, the turning point on the question of the defendant's negligence. Whether the defendant is bound by statute or common law to keep one or more flagmen at a public crossing is not a material question just now, since the proof shows that the company had accustomed the public to depend on such flagmen by employing them, and having established the custom they cannot be allowed to abandon it at their pleasure.

If, then, you shall find that Lutz was negligent in failing to perform any part of his duty at the time of the accident, the defendant cannot escape liability for its results.

In immediate connection with Lutz's performance of his duty or

of his failure to perform it you will also consider whether it
48 was not an unwise and inexcusable relaxation of care and prudence on the part of the defendant in leaving only one flagman at this busy crossing after 10 o'clock at night, where before that hour there had been two, and thereby imposing a heavier labor and responsibility on him than he could discharge.

Negligence and the definition is suggested by the charge of an eminent judge of this State in a similar case—is the omission of that duty which the law has placed upon one party whereby an injury has been occasioned to another. What, then, was the duty of the defendant in adopting necessary precautions to guard the public from danger at this crossing? Did the company, through its agents, exercise sufficient care and prudence on the night of the accident to avoid it?

Was the accident caused entirely by the fault of the car-drivers and without any neglect of duty on the part of the defendant? If you can answer these last two questions affirmatively, then your verdict should be for the defendant; on the contrary, if, on a fair and painstaking examination of the whole case, you shall be satisfied that the defendant's negligence only contributed to the accident, and that the car-driver was equally negligent, or even more so, your verdict should be for the plaintiff.

In concluding we must remind you that as between the plaintiff and the defendant in this case you must hold the balance as evenly as if you were passing on the rights of two private individuals, and not between an uninfluential person and a rich and power-
49 ful corporation; nothing more than even-handed justice should be exacted from the one or administered to the other.

In the event of your verdict being for the plaintiff the question will arise as to the amount of damages and how they shall be computed.

Mrs. Laughlin left two children, a boy and a girl, aged 8 and 5½ years, respectively. The deceased woman was thirty-one years old at the time of her death. She had been in excellent health, was well educated, accomplished, and in every respect competent and qualified to discharge her maternal duties in the moral and intellectual education and training of her children, as well as to care and provide for their physical comfort and culture. She had already begun to impart to them religious instruction and to teach them the first elements of learning.

Her surviving husband is still a young man, and it is not improbable that he may again marry a wife. He is legally bound to maintain and educate his children. On these facts it is contended for the defendant that, even should the jury find for the plaintiff, they can give him only nominal damages under the special limitation of the statute which restricts them to an amount which the jury shall deem fair and just with reference to the pecuniary injury resulting from the death of the mother to her children, who are her only next of kin. We cannot agree to this proposition.

50 There must be some pecuniary injury to the young children of such a mother as Mrs. Laughlin is described to be by her death. The only difficulty is in fixing upon some basis of calculation in estimating in dollars and cents the value of that of which they have been deprived; but, difficult and delicate as the task may be, the jury may have to undertake it. You are not to give compensation for the loss of a mother's love and tender devotion or for the deprivation of her society and sympathy in the family circle and in the troubles and disappointments of youthful life.

All these associations which hallow the name of a good mother and cling to the memory of her children to their latest breath must be coolly and dispassionately put aside.

The law wisely and justly takes no account of them, for the simple reason that their money value cannot be ascertained. Such losses are occurring every day, not by accident, but in the course of nature, and cannot be supplied. How, then, is the pecuniary injury inflicted by such a death caused by a preventible accident to be ascertained? One mode may be to count the probable cost of obtaining an equivalent substitute.

Nurses and teachers can be procured for moderate wages, but a hired nurse does not and cannot as a general rule fill the place of a devoted, patient, and self-sacrificing mother.

51 Superior instructors may be found, but they do not supply the natural watchfulness over the child's moral growth. The whole difficulty is in fixing a pecuniary value on a mother's services to her children separate and apart from the maternal love and care which she instinctively feels and exercises for them from their birth onward; but if there is any pecuniary advantage or benefit in a mother's nursing, teaching, guardianship, and general watchfulness of a child's physical, mental, and moral growth over the like services performed by paid substitutes, then on the death of the mother the child may be said to have been deprived of a reasonable expectation of a pecuniary advantage. It is a substantial and material advantage to every child to have a good and faithful mother.

Common observation shows us that men and women who have enjoyed the advantages of maternal care, instruction, and influence during childhood and youth are better equipped for future usefulness and success in life than others who have been early deprived of such advantages. There are exceptions, it is true, but actual experiences and probabilities all point to the same general direction. There must be some value in the prospect of such usefulness and success, and you will have to come as near to it as you can.

We must repeat to you in closing these instructions that you must rigidly discard all sentimental feelings in relation to Mrs.

52 Laughlin's death and the sorrow and distress of her husband and children. The law gives no relief for these, but as practical business men, actuated by a sincere desire to do justice between these parties according to the provisions of this statute, you will calculate the value of the maternal advantages which the children of Mrs. Laughlin have lost by her death.

Thereupon the counsel for the defendant excepted to that portion

of the charge which permits the jury to impute negligence to the railroad company, the defendants, to this extent for not using or misusing the signal on the sidewalk, to wit:

(1) Whether the defendants' agents employed at the crossing to lower the gate bars at the side tracks for the protection of pedestrians and to notify the drivers of vehicles when trains were coming were prompt and careful in the discharge of their duties on this occasion.

Also to that part of the charge which justified the jury in imputing negligence upon the use or failure to use the red signal, to wit:

(2) Lutz is, however, sustained in one respect: he had ceased to wave his white lantern, the signal of that a train is coming, and he had left his red lantern, the signal of danger to an approaching train, at his shanty and had not time to run and get it. It is possible—nay, probable—that if the red signal had been shown to the engineer of the west-bound train the accident would have been prevented.

53 Also to that part of the charge which holds that more than nominal damages can be recovered in this case, to wit:

(3) In the event of your verdict being for the plaintiff, the question will arise as to the amount of damages and how they shall be computed. Mrs. Laughlin left two children—a boy and girl—aged 8 and 5½ years respectively. The deceased woman was 31 years old at the time of her death. She had been in excellent health, was well educated, accomplished, and in every respect competent and qualified to discharge her maternal duties in the moral and intellectual education and training of her children, as well as to care and provide for their physical comfort and culture. She had already begun to impart to them religious instruction and to teach them the first elements of learning. Her surviving husband is still a young man, and it is not improbable that he may again marry a wife.

He is legally bound to maintain and educate his children. On these facts it is contended for the defendant that even should the jury find for the plaintiff they can give him only nominal damages under the special limitation of the statute, which restricts them to an amount which the jury shall deem fair and just with reference to the pecuniary injury resulting from the death of the mother to her children, who are her only next of kin. We cannot agree to this position. There must be some pecuniary injury to the young children of such a mother as Mrs. Laughlin is described to be. By

54 her death the only difficulty is in fixing upon some basis of calculation, in estimating in dollars and cents the value of that which they have been deprived.

But, difficult and delicate as the task may be the jury may have to undertake it. You are not to give compensation for the loss of a mother's love and tender devotion or for the deprivation of her society and sympathy in the family circle. All these associations which hallow the name of a good mother and cling to the memory of her children to their latest breath must be dispassionately put aside. The law wisely and justly takes no account of them for the simple reason that their money value cannot be ascertained. Such losses are

occurring every day, not by accident, but in the course of nature, and cannot be supplied. How, then, is the pecuniary injury inflicted by such a death, caused by a preventible accident, to be ascertained? One mode may be to count the probable cost of obtaining an equivalent substitute.

Nurses and teachers can be procured for moderate wages, but a hired nurse does not and cannot as a general rule fill the place of a devoted, patient, and self-sacrificing mother.

Superior instructors may be found, but they do not supply the natural watchfulness over the child's moral growth. The whole difficulty is in fixing a pecuniary value on a mother's services to her children separate and apart from the maternal love and care which she instinctively feels and exercises for them from their birth
55 onward; but if there is any pecuniary advantage or benefit in a mother's nursing, teaching, guardianship, and general watchfulness for a child's physical, mental, and moral growth over the like services performed by paid substitutes, then on the death of the mother the child may be said to have been deprived of a reasonable expectation of a pecuniary advantage. It is a substantial and material advantage to every child to have a good and faithful mother.

Common observation shows us that men and women who have enjoyed the advantages of maternal care, instruction, and influence during childhood and youth are better equipped for future usefulness and success in life than others who have been early deprived of such advantages.

There are exceptions, it is true, but actual experiences and probabilities all point to the same general direction. There must be some value in the prospect of such usefulness and success, and you will have to come as near it as you can.

Also to that part of the charge which gives directions or instructions to the jury as to the rate of speed at which the train was running that night, to wit: (4) In investigating this branch of the inquiry you will remember the statement of the engineer in reference to the rates of speed at which he passed these different points. We will not recapitulate them, and only call your attention to
56 them in order that you may calculate as accurately as possible the actual speed of the train from the Passaic bridge to Market street. The engineer admits that he was running at not less than ten miles an hour at Commerce street. The testimony of plaintiffs' witnesses makes it greater; and one test of the defendant's negligence may be applied just here, to wit: Whether, in approaching a crowded thoroughfare like the Market-street station, the engineer had his train under sufficient control to check its speed in obedience to the signal of the flagman and to avoid coming into collision with horses or vehicles which were passing or about to pass directly across his track, for the rule must be constantly kept in view that trains, in going through large and populous towns and cities and in crossing streets, should be run with much greater care and at a slower rate of speed than when in open country, where

there is much less travel and where they can be seen and heard from greater distances.

Also to that part of the charge leaving it to the jury to say whether there was any negligence in taking off one flagman after ten o'clock on Sunday night, in view of the evidence and the time-table, which shows the infrequency of the trains, and the absence of street traffic over this particular crossing at that time, to wit: (5) We have called your attention to this portion of the testimony because it is perhaps the turning point on the question of the defendant's negligence. Whether the defendant is bound by statute or common
57 law to keep one or more flagmen at a public crossing is not a material question just now, since the proof shows that the company had accustomed the public to depend on such flagmen by employing them, and having established the custom they cannot be allowed to abandon it at their pleasure. If, then, you shall find that Lutz was negligent in failing to perform any part of his duty at the time of the accident the defendant cannot escape liability for its results. In immediate connection with Lutz's performance of his duty or of his failure to perform it you will also consider whether it was not an unwise and inexcusable relaxation of care and prudence on the part of the defendant in leaving only one flagman at this busy crossing after ten o'clock at night, where before that hour there had been two, and thereby imposing a heavier labor and responsibility on him than he could discharge.

And upon the counsel for defendant tendering this his bill of exception to the said matter referred to above contained in the charge of his honor the said judge, and praying that the same might be sealed according to the statute in such case made and provided, it was sealed accordingly.

L. E. WALES, *J.* [L. S.]

58 Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS J. LAUGHLIN, Adm'r, &c., Defendant in Error.
} Assignment of Errors.

On error to the circuit court of the United States for the district of New Jersey, of October term, in the year of our Lord one thousand eight hundred and eighty-seven.

Afterwards, to wit, on the second Monday of October in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the Pennsylvania Railroad Company, by William H. Bradley, its attorney, and says that in the record and proceedings aforesaid, and also in the matter recited and contained in the bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error, to wit:

59 First. That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Thomas J. Laughlin, adm'r, &c., to have and maintain his said action against the Pennsylvania Railroad Company.

Second. There is error also in this, to wit, that the said judge before whom the said cause was tried at and upon the aforesaid trial of the said issue so joined between the parties aforesaid admitted evidence to be given on the part of the plaintiff below tending to show that the plaintiff's intestate, Mary Laughlin, performed the duties of a good and capable mother toward her two children in their nurture and in their moral, intellectual, and physical training.

Third. There is also error in this, to wit, for that on the said trial the said judge refused to charge the jury, as requested by the counsel of the defendant below, "that the obligation at any time to keep a flagman at a crossing over a street or highway arises out of and depends upon the degree of danger to which persons are ex-
60 posed who have occasion to cross the railroad in using the street or highway, and that the defendant below was not required on the day on which and at the hour at which the accident occurred to keep a flagman at the crossing where it occurred."

Fourth. There is also error in this, to wit, for that on the said trial the said judge refused to charge the jury, as requested by the counsel of the defendant below, "that if the defendant, at the time of the occurrence in question, had a flagman at the crossing where it occurred in a proper position and at such a time as to give to persons in the roadway about to cross the track sufficient notice of the approaching train everything that was required of the defendant train and of signals across the sidewalks or elsewhere becomes im-was done, and that in such case the question of the speed of the material."

Fifth. There is also error in this, to wit, for that on said trial the said judge refused to charge the jury, as requested by the counsel for the defendant below, "that the engineer of the colliding train,
61 when said train came in sight of the crossing and when he saw the street car standing at some distance from the railroad track, had a right to suppose that the driver of said car would not attempt to cross before said train."

Sixth. There is also error in this, to wit, for that on said trial the said judge refused to charge the jury, as requested by the counsel of the defendant below, "that, notwithstanding the death of the mother, the father remained bound to provide for his children suitable care, nurture, and education, and in estimating the damages founded on the supposed pecuniary loss sustained by the children by being deprived of the peculiar care, education, and nurture which the mother could have bestowed the jury must take into consideration that it is the father's duty to take all proper means to supply such loss, and damages can only be recovered in respect of such loss as cannot be supplied by the father and others employed by him."

Seventh. There is also error in this, to wit, for that on said trial the said judge charged the jury that they might consider in deter-

mining the question whether the accident which resulted in
62 the death of the plaintiff's intestate was due to the neglect of the agents of the defendant below, employed at the crossing where the collision occurred, to lower the gate bars at the sidewalks intended for the protection of pedestrians.

Eighth. There is also error in this, to wit, for that on the said trial the said judge charged the jury that the accident was due to the failure of the flagman at the crossing to show the red signal to the engineer of the approaching train.

Ninth. There is also error in this, to wit, for that on the said trial the said judge charged the jury that. if the jury should find for the plaintiff they could give more than nominal damages.

Tenth. There is also error in this, to wit, for that on the said trial the said judge charged the jury that it was the duty of the defendant's engineer of the colliding train to have his engine under sufficient control to check its speed so as to avoid collision with a vehicle about to cross the tracks as he approached the crossing.

Eleventh. There is also error in this, to wit, for that on the said trial the said judge charged the jury that it was the duty of
63 the defendant below to employ flagmen at said crossing, because it had accustomed the public to depend on such flagmen by employing them there, and that the jury might determine what number of flagmen it was the duty of the defendant below to station at said crossing after ten o'clock at night.

W. H. BRADLEY,
Attorney for said Plaintiff in Error.

63½ [Endorsed:] United States Supreme Court. The Pennsylvania Railroad Company, pl'ff in error, *vs.* Thomas J. Laughlin, adm'r, &c., def't in error. Assignment of errors.

64 UNITED STATES OF AMERICA, } ss:
District of New Jersey, }

I certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the district of New Jersey in the third circuit in a certain suit at law therein lately pending between Thomas J. Loughlin, administrator, &c., plaintiff, and The Pennsylvania Railroad Company, defendant.

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

In testimony whereof I hereto subscribe my name and affix the seal of the said circuit court, at Trenton, in said district, this seventh day of October, A. D. 1887, and in the one hundred and twelfth year of the Independence of the United States.

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: New Jersey C. C. U. S. No. 278. The Pennsylvania Railroad Company, plaintiff in error, *vs.* Thomas J. Laughlin, administrator of Mary Laughlin, deceased. Filed October 24, 1887.

JAMES H. McKENNEY
CLERK

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SUPREME COURT OF THE UNITED STATES,

October Term, 1890.

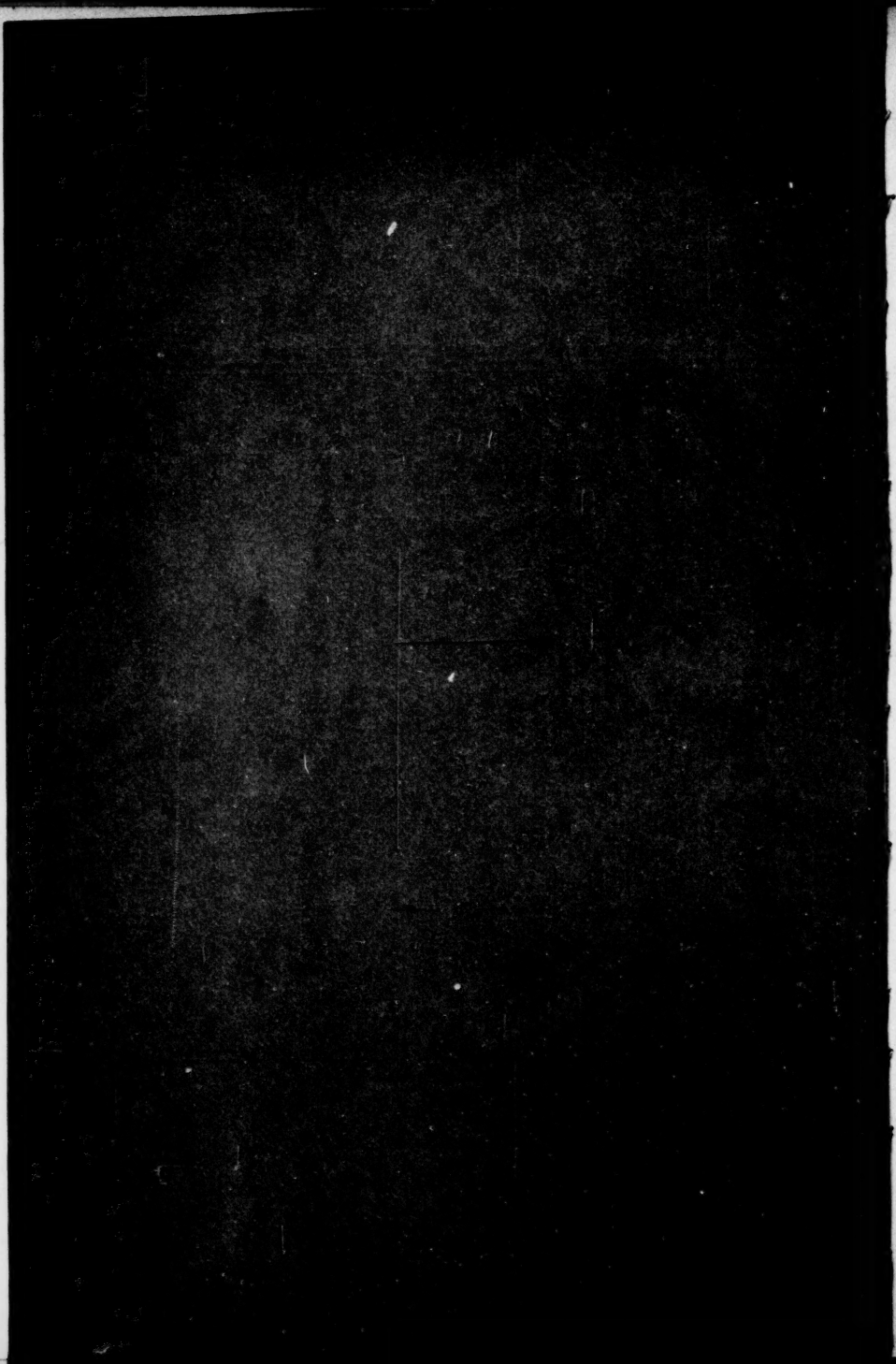
No. 276.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

THOMAS J. LAUGHLIN, ADMINISTRATOR OF MARY LAUGHLIN, DECEASED,
Defendant in Error.

Brief of JAMES B. VREDENBURGH, for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES,

October Term, 1890.

No. 278.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

THOMAS J. LAUGHLIN, ADMINISTRATOR OF MARY LAUGHLIN, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Brief of JAMES B. VREDENBURGH, Counsel for Plaintiff in Error.

I. STATEMENT OF THE CASE.

Thomas J. Laughlin, the husband of Mary Laughlin, brings suit as her adminsitrator to recover damages resulting from her death on September 21, 1884.

The declaration states that on September 21, 1884, deceased was riding in a horse car on Market street, in the City of Newark, and across the tracks of the plaintiff in error, when said car was struck by the locomotive of the plaintiff in error, and from such collision deceased was so injured that she died the next day.

The declaration fails to state that the deceased left a person entitled to damage. The court permitted the plaintiff (defendant in error) to show (p. 16) that deceased was married, that the administrator was her husband, and that she left two children, and that she performed the duties toward them of a good and capable mother in their moral, intellectual and physical training.

The verdict was for $15,000, which was reduced by the court to $10.000 on rule to show cause.

The questions involved are: First. The sufficiency of the declaration. It does not show that the deceased left a person entitled to the damages; that is raised by the first assignment of error (p. 28).

Second. Whether the evidence offered by the defendant in error (pp. 16 and 17), tending to show that the deceased performed the duties of a good and capable mother towards her two children, in their nurture, and in their moral, physical and intellectual training, and admitted by the court was admissible. This is raised by exception (p. 17) and second error assigned (p. 28).

Third. Whether the judge should have charged as requested by the plaintiff in error (p. 18), that "notwithstanding the death of the mother, the father remained bound to provide for his children suitable care, nurture and education; and, in estimating the damages founded on a supposed pecuniary loss sustained by the children by being deprived of the peculiar care, education and nurture which a mother could have bestowed, the jury must take into consideration that it is the father's duty to take all proper means to supply such loss, and damages can only be recovered in respect of such loss as cannot be supplied by the father and others employed by him."

This is raised by exception (p. 18) and sixth error assigned (p. 28).

Fourth. The charge of the judge that there must be some pecuniary damage to the children of such a mother as Mrs. Laughlin is described to be by her death.

This is raised by exception (p. 27) and ninth error assigned (p. 29).

Fifth. The charge of the court that it was the duty of the engineer of the train of the plaintiff in error to have his engine under sufficient control to check its speed so as to avoid collision with a vehicle about to cross the tracks as he approached the crossing.

This is raised by exception (p. 27) and tenth error assigned (p. 29).

Sixth. The charge of the court that it was the duty of the plaintiff in error to employ flagmen at said crossing because it had accustomed the public to depend on such flagmen, by employing them there, and that the jury might determine what number of flagmen it was the duty of the defendant below to station at said crossing after ten o'clock at night.

This is raised by exception (p. 27) and eleventh error assigned (p. 29).

II. SPECIFICATION OF THE ERRORS RELIED UPON.

First. That judgment was entered for the plaintiff, whereas for want of a sufficient declaration it should have been entered for the defendant.

Second. That the court admitted the evidence following against the objection of the plaintiff in error.

Question by plaintiff's counsel. Your wife left two children, I believe?

A. Yes, sir.

Q. What were they, boys or girls?

A. One of them was a boy and the other a girl.

Q. Will you give their names and their ages?

A. Their names are Willie I. Laughlin and Louise M. Laughlin.

Q. And their ages at that time?

A. They were — years old and 5½.

Q. William being 8?

A. Yes, sir; and the girl five and a half.

A. I will ask you, sir, the question already put in relation to Mrs. Laughlin, and you can answer it point by point. Did the deceased perform the duties of nurture to these children—of their intellectual, moral and physical training? Did she educate them? What was her character and capacity in these respects? The first branch of the question is, how did she perform the duties of nurture?

A. In every way becoming a good mother; attentive to her children at all times.

Q. Now, as to their intellectual training?

A. When they became of a sufficient age to be educated, every night after tea, or nearly every night, when her leisure from other duties would permit her, she would take them to her and give them such education as their minds were fit to receive. She taught them the rudiments of simple education. They were not old, as you know, and she took an interest in having them become well educated.

Q. Now, as to their moral training?

A. It was good, sir, in every way.

Q. Was she their instructress in morals and education?

A. She was their instructress in morals and she was a good instructor in religion—attended to their little religious duties as a good mother would.

Q. Now, as to their physical training?

A. She took care of them.

Q. Did she see to their health?

A. Yes, sir; when they were sick she was anxious about them and took good care of them.

Q. What was the result of this physical training—were they healthy children?

A. They were very; both of them fine children of their age.

Q. Now, I ask you the last branch of the question. What was her character and capacity in these respects—the discharge of these maternal duties?

A. Her ability to perform the duty of a good mother was great—her ability was good and her moral character was above reproach.

Q. In this respect of maternity?

A. They were good—her abilities were good.

Third. That the judge refused to charge the request following:—

"Notwithstanding the death of the mother, the father remained bound to provide for his children suitable care, nurture and education; and, in estimating the damages founded on a supposed pecuniary loss sustained by the children by being deprived of the peculiar care, education and nurture which a mother could have bestowed, the jury must take into consideration that it is the father's duty to take all proper means to supply such loss, and damages can only be recovered in respect of such loss as cannot be supplied by the father and others employed by him."

Fourth. But on the contrary charged as follows:—

In the event of your verdict being for the plaintiff, the question will arise as to the amount of damages and how they shall be computed.

Mrs. Laughlin left two children, a boy and a girl, aged 8 and 5½ years, respectively. The deceased woman was thirty-one years old at the time of her death. She had been in excellent health, was well educated, accomplished, and in every respect competent and qualified to discharge her maternal duties in the moral and intellectual education and training of her children, as well as to care and provide for their physical comfort and culture. She had already begun to impart to them religious instruction and to teach them the first elements of learning.

Her surviving husband is still a young man, and it is not improbable that he may again marry a wife. He is legally bound to maintain and educate his children. On these facts it is contended for the defendant that, even should the jury find for the plaintiff, they can give him only nominal damages under the special limitation of the statute which restricts them to an amount which the jury shall deem fair and just with reference to the pecuniary injury resulting from the death of the mother to her children, who are her only next of kin. We cannot agree to this proposition.

There must be some pecuniary injury to the young children of such a mother as Mrs. Laughlin is described to be by her death. The only difficulty is in fixing upon some basis of calculation in estimating in

dollars and cents the value of that of which they have been deprived; but, difficult and delicate as the task may be, the jury may have to undertake it. You are not to give compensation for the loss of a mother's love and tender devotion, or for the deprivation of her society and sympathy in the family circle and in the troubles and disappointments of youthful life.

All these associations which hallow the name of a good mother and cling to the memory of her children to their latest breath must be coolly and dispassionately put aside.

The law wisely and justly takes no account of them, for the simple reason that their money value cannot be ascertained. Such losses are occurring every day, not by accident, but in the course of nature, and cannot be supplied. How, then, is the pecuniary injury inflicted by such a death caused by a preventible accident to be ascertained? One mode may be to count the probable cost of obtaining an equivalent substitute.

Nurses and teachers can be procured for moderate wages, but a hired nurse does not and cannot as a general rule fill the place of a devoted, patient, and self-sacrificing mother.

Superior instructors may be found, but they do not supply the natural watchfulness over the child's moral growth. The whole difficulty is in fixing a pecuniary value on a mother's services to her children separate and apart from the maternal love and care which she instinctively feels and exercises for them from their birth onward; but if there is any pecuniary advantage or benefit in a mother's nursing, teaching, guardianship and general watchfulness of a child's physical, mental and moral growth, over the like services performed by paid substitutes, then on the death of the mother the child may be said to have been deprived of a reasonable expectation of a pecuniary advantage. It is a substantial and material advantage to every child to have a good and faithful mother.

Common observaton shows us that men and women who have enjoyed the advantages of maternal care, instruction, and influence during childhood and youth are better equipped for future usefulness and success in life than others who have been early deprived of such advantages. There are exceptions, it is true, but actual experiences and probabilities all point to the same general direction. There must be some value in the prospect of such usefulness and success, and you will have to come as near to it as you can.

We must repeat to you in closing these instructions that you must rigidly discard all sentimental feelings in relation to Mrs. Laughlin's

death and the sorrow and distress of her husband and children. The law gives no relief for these; but as practical business men, actuated by a sincere desire to do justice between these parties according to the provisions of this statute, you will calculate the value of the maternal advantages which the children of Mrs. Laughlin have lost by her death.

Fifth. That the judge charged as follows (pp. 19, 20):—

In investigating this branch of the inquiry, you will remember the statement of the engineer in reference to the rates of speed at which he passed these different points. We will not recapitulate them, and only call your attention to them in order that you may calculate as accurately as possible the actual speed of the train from the Passaic bridge to Market street. The engineer admits that he was running at not less than ten miles an hour at Commerce street. The testimony of plaintiffs' witnesses makes it greater; and one test of the defendant's negligence may be applied just here, to wit: Whether, in approaching a crowded thoroughfare like the Market street station, the engineer had his train under sufficient control to check its speed in obedience to the signal of the flagman and to avoid coming into collision with horses or vehicles which were passing or about to pass directly across his track, for the rule must be constantly kept in view that trains, in going through large and populous towns and cities and in crossing streets, should be run with much greater care and at a slower rate of speed than when in open country, where there is much less travel and where they can be seen and heard from greater distances.

Sixth. That the judge charged as follows (p. 22):—

We have called your attention to this portion of the testimony because it is perhaps the turning point on the question of the defendant's negligence. Whether the defendant is bound by statute or common law to keep one or more flagmen at a public crossing is not a material question just now, since the proof shows that the company had accustomed the public to depend on such flagmen by employing them, and having established the custom they cannot be allowed to abandon it at their pleasure. If, then, you shall find that Lutz was negligent in failing to perform any part of his duty at the time of the accident, the defendant cannot escape liability for its results. In immediate connection with Lutz's performance of his duty, or of his failure to perform it, you will also consider whether it was not an unwise and inexcusable relaxation of care and prudence on the part of the defendant in leaving only one flagman at this busy crossing after ten o'clock at

night, where before that hour there had been two, and thereby imposing a heavier labor and responsibility on him than he could discharge.

BRIEF OF THE ARGUMENT.

1. The declaration should show that the deceased left a person entitled to the damages.

Blake *vs.* Midland Railway Co., 18 Q. B., 94.
Pym *vs* Great Northern Railway, 4 Best & Smith, 396.
Skelton *vs.* London & N. W. R. R., L. R. 2, C. P., 631.
Lucas *vs.* N. Y. Central R. R., 21 Barb., 245.

At the trial the plaintiff below was permitted to prove that the deceased left two children, and that damages were sustained by them because of their loss of religious training.

We insist that the declaration should have stated that there were next of kin—who they were—in what relation they were to the deceased.

There is no power in this court to amend the declaration at this stage. The defendant below was not obliged to be prepared at the trial to meet, and was not prepared to meet such claims.

2. The court permitted the plaintiff below to prove, notwithstanding the objection of the defendant, in answer to the following question:

"Q. Now as to their intelectual training?

"A. When they became of sufficient age to be educated, every night after tea, or nearly every night, when her leisure from other duties would permit her, she would take them to her and give them such education as their minds were fit to receive."

The effect of this was to lead the jury to conclude that by the death of the mother the children lost their opportunity to be educated, and that therefore they were entitled to be paid what that loss was worth in money, i. e., the value of education to a person.

3. The judge should have charged, as requested, that the plaintiff below could only recover nominal damages.

4. The effect of the language of the court in charging the jury that Mrs. Laughlin had begun to impart to her children religious instruction, was to lead the jury to think that the children were entitled to recover the damages resulting to them from a loss of religious training.

They might, notwithstanding the death of their mother, have had religious training.

Were the jury authorized to give them compensation for their lack of religious training?

The logic of the charge is that, as the child will lack religious training because of the death of the mother, therefore the plaintiff in error must pay it—the pecuniary value of such religious training.

Religious training is to fit the child for the next world. Compensation for loss of that is not within the statute.

It should not have been an element of pecuniary damage. The jury must have been misled, for, on no theory of just compensation, could they have given these children $7,500 each for the pecuniary loss resulting from Mrs. Laughlin's death.

5. The court erred in charging that it was the duty of the engineer to have his engine under sufficient control to check its speed so as to avoid collision with a vehicle about to cross the tracks as he approached the crossing.

Such an instruction was held erroneous in

Cohen *vs.* Eureka & Palisade R. R. Co., 14 Nev., 376.

6. The judge erred in leaving it to the jury to determine whether it was an unwise and inexcusable relaxation of care and prudence on the part of the defendant in leaving only one flagman at this crossing after ten o'clock at night.

It is true the jury might have been permitted to determine whether the defendant below had adopted and had sufficient safeguards and signals to warn travelers at that crossing at that time of night, but they had no right to determine, and the court had no authority to submit to them the question as to the necessity of two flagmen, or the number of flagmen necessary at that point at that time.

Penn'a R. R. Co. *vs.* Matthews, 7 Vroom, 531.

Cliff *vs.* Midland R'y, L. R., 5 Q. B., 258.

In this latter authority all general liability in railway companies to provide flagmen is entirely repudiated, but, at the same time, their responsibility for not providing against unusual risks of their own creation is just as decidedly maintained.

Beisiegel *vs.* N. Y. Central, 40 N. Y., 9.

Jury cannot be permitted to decide what is incumbent on a railway company whose tracks intersect a street that is much used in a populous town to station flagmen there.

JAMES B. VREDENBURGH,
Of Counsel.

Office Supreme Court U. S.
FILED,
MAR 30 1891
JAMES H. McKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

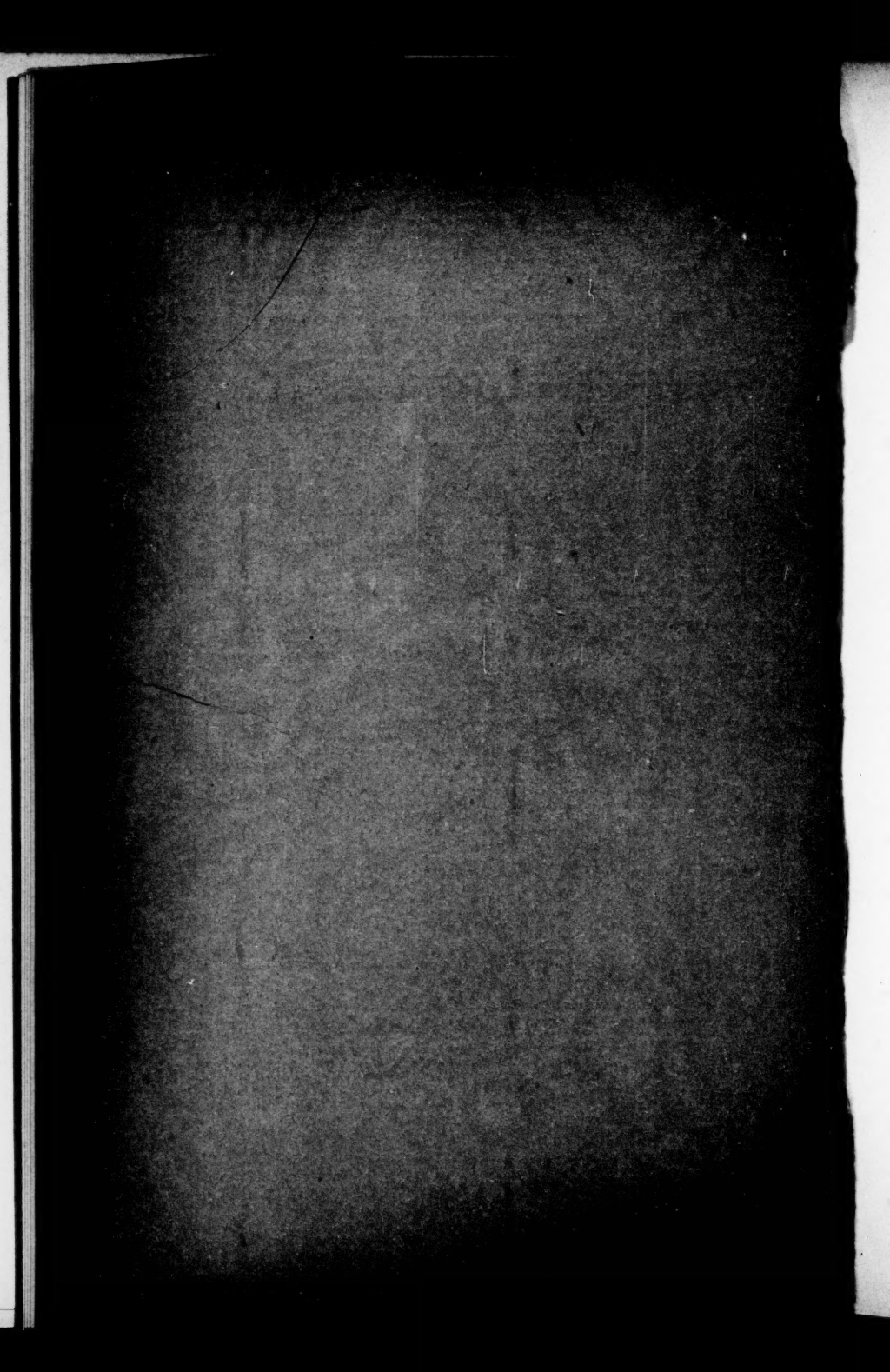
No. 278.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

THOMAS J. LAUGHLIN, ADMINISTRATOR OF MARY LAUGHLIN, DECEASED,
Defendant in Error.

BRIEF OF CORTLANDT PARKER AND RICHARD WAYNE PARKER, FOR DEFENDANT IN ERROR.



THE SHARP PRINTING CO., 23 & 25 N. Warren St., Trenton, N. J.

Supreme Court of the United States.

OCTOBER TERM, 1890.

NO. 278.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

v.

THOMAS J. LAUGHLIN, ADMINISTRATOR OF MARY LAUGHLIN, DECEASED,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of New Jersey.

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As to third assignment, it was charged that duty to keep a flagman depends on degree of danger. That question in this case was left to the jury, with instruction that a flagman being kept, the public had a right to depend on his presence..... 10

As to eleventh assignment, that instruction is established law..... 11

As to fourth assignment, the charge requested was substantially given, that if sufficient notice was given by the flagman other questions are immaterial..... 12

As to fifth assignment. The request made was immaterial and untrue. The engineer's right to go ahead depended on signals, not on his view of the horse car..... 13

As to the seventh assignment. There is no evidence printed as to the gates on the sidewalk, and these gates were part of the signals to the public. The assignment does not correspond with the charge, and the charge was correct..... 13

As to eighth assignment. The judge did not charge as assigned, that the accident was due to the flagman's negligence, but left that question to the jury..... 13

As to tenth assignment, he did not charge as assigned, but left the question, whether the engineer should have had his train in control, to the jury..... 14

III. EVIDENCE AND CHARGE AS TO DAMAGES..... 14

As to second assignment. The next of kin (two young children), by the death of their mother, suffered an injury of pecuniary value in the loss of her care, education and nurture..... 14

As to sixth assignment. That this loss *may* be partially supplied from other sources by the father, at an expense to the family, does not limit the recovery as assigned to such loss as *cannot* be supplied by him..... 14

As to ninth assignment. The judge rightly refused to charge that only nominal damages could be recovered. The judge's charge on this subject..... 15

Cases cited—Tilley *v.* Hudson R. R. R. Co..... 16-22
Pennsylvania R. R. *v.* Goodman..... 22
Illinois R. R. *v.* Barren..... 22

These points as to damages were waived on motion for new trial, reduction of damage, and assent thereto under the New Jersey statute as to practice.

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BRIEF.

STATEMENT OF CASE.

This defendant, plaintiff below, recovered a verdict and had judgment in an action for the death of Mary Laughlin, of whom he was duly appointed administrator. She was his wife, and she was killed at the Market street crossing in Newark, September 21st, 1884, by the collision of a locomotive of the plaintiff in error with a horse car upon the street railway there, in which she was a passenger.

The plaintiff's suit was for the benefit of her next of kin, a boy of eight and a girl of five and a half years, her children.

This recovery was under an act of New Jersey, which reads as follows:

"1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"2. Every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just,

with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person; *provided*, that every such action shall be commenced within twelve calendar months after the death of such deceased person.

"3. On request by the defendant, or the defendant's attorney, the plaintiff on the record shall be required to deliver to the defendant, or to the defendant's attorney, a particular account in writing of the nature of the claim in respect to which damages shall be sought to be recovered."

The plaintiff in error has not included the evidence in his bill of exceptions. The facts alleged as to the cause of action are to be gathered from the declaration, pages 5 to 8, folios 9 to 15. The evidence as to who were next of kin, and as to the details of the matter, is to be found on pages 16, 17, folios 33 to 35, and the requests, charges and exceptions, on pages 17 to 27, folios 36 to 57.

It appears from the case that Mrs. Laughlin was traveling in a horse car, crossing a double track steam railroad, on a crowded thoroughfare, in the city of Newark, at Market street station, being the principal station of the Pennsylvania railroad—Market street being a principal, if not the chief, thoroughfare of that populous city.

There arose before the jury three questions:

First. As to an alleged high or unusual rate of speed in the train, and whether it was behind time. Says the judge (folio 40): "You will consider whether it was even a few seconds behind time, and, in consequence thereof, was going at a greater rate of speed than usual just before it reached the crossing." Folio 41. "The engineer admits that he was running at not less than ten miles an hour at Commerce street. The testimony of plaintiff's witnesses makes it greater, and one test of the defendant's negligence may be applied just here, to wit, whether, in approaching a crowded thoroughfare like the Market street station, the engineer had his train under sufficient control to check its speed in

obedience to the signal of the flagman, and to avoid coming into collision with horses or vehicles which were passing, or about to pass, directly across his track, for the rule must be constantly kept in view that trains, in going through large and populous towns and cities, and in crossing streets, should be run with much greater care, and at a slower rate of speed, than when in open country, where there is much less travel, and where they can be seen and heard for greater distances."

Second. Whether the headlight was visible at sufficient distance or the bell rung or the whistle blown in time. Folio 43.

"The testimony on this point is conflicting and contradictory, and the question must be decided by you on the preponderating weight of evidence and the probabilities of what actually occurred. There is no doubt that the engine was provided with a headlight; whether or not that light could be and was seen at a sufficient distance from the crossing to be of service as a signal on the night of the accident is a subject about which the witnesses differed. An east-bound train had just left the Newark station, and the rear car was passing Commerce street when the engine of No. 241 reached that point, and how far, if at all, the headlight of the latter was intercepted by the outgoing trains and by other obstacles mentioned by the witnesses it will be for you to determine. If the headlight of the rapidly approaching locomotive is seen but a short distance away from a street crossing, it would be more likely to bewilder and alarm than to give time to escape it. So with reference to the ringing of the bell and the sound of the steam whistle. These signals should also be given in time to be of service. On these matters you have positive as well as negative testimony."

We note here outgoing trains and other obstacles to view, and the question whether the whistle was given in time.

Third. The acts of omission of the flagmen stationed at the crossing. Folio 45. "Up to ten o'clock there had been two flagmen at the crossing; after that hour Lutz was left in charge alone." He had charge of two tracks. Folio 45. "There are two tracks, called respectively the east and west tracks, and the flagman who had charge of the west track had gone off at ten o'clock, thus leaving Lutz to attend to both. By the plaintiff's evidence, after the east-bound train left, the flagman signalled the horse car ahead and laid his lantern down." Folio 46. "James McDonough, who was the driver of the car that was struck, and who had had seven years' experience as a car driver prior to the accident, and is still in the same occupation, testifies that, when he approached the defendant's track, he stopped his horses about twenty feet away, as he usually did, and the conductor went ahead and out between the tracks of the defendant. He received his signal after the east-bound train had gone out—'All right to go on.' He saw the flagman Lutz go to the shanty on the left and lay his lantern down. McDonough then started his horses on a walk, but before he cleared the west-bound track heard the whistle and saw the flash of the headlight at the same time, and the car was struck. He swears that he never halted on the track. McDonough's statements are corroborated by John Cade, the driver of the car directly behind McDonough's, and of James A. Shannon, the conductor. Hoey, the conductor of McDonough's car, has died since the accident."

Folio 47. "Lutz is, however, sustained in one respect. He had ceased to waive his white lantern, the signal that a train is coming, and he had left his red lantern, the signal of danger to an approaching train, at his shanty, and had not time to run and get it. It is possible, nay, probable, that if the red signal had been shown to the engineer of the west-bound train, the accident would have been prevented."

"We have called your special attention to this portion of the testimony because it is, perhaps, the turning point on the question of the defendant's negligence. Whether the defendant is bound by statute or common law to keep one or more flagmen at a public crossing, is not a material question just now, since the proof shows that the company had accustomed the public to depend on such flagmen by employing them, and, having established the custom, they cannot be allowed to abandon it at their pleasure."

There is thus in the case abundant evidence of negligence on the part of the railroad company, in a large town, at a crowded thoroughfare, resulting in the horrible death of several innocent persons, including a wife and mother, for whose loss to her children this action is brought.

This evidence is so strong that the plaintiff in error has not printed it or attempted to controvert its force, but has directed his assignments of error to three classes of technical points.

ASSIGNMENTS OF ERROR.

First. Whether the declaration is sufficient. Assignment 1st, folio 59.

Second. Whether the judge's charge and refusals to charge were correct as to the obligations of the railroad and its servants. Assignments 3d, 4th, 5th, 7th, 8th, 10th and 11th, folios 59 to 63.

Third. Whether under the statute children could recover more than nominal damages for the loss of a mother. Assignments 2d, 6th and 9th, folies 59 to 63.

These will be considered in their order.

POINTS.

I. The Declaration.

The declaration is sufficient. But if not, it will be amended under the New Jersey practice. By section 138 of the Practice act it is provided: "In order to prevent the failure of justice by reason of mistakes and objections of form, it shall be lawful for the court, or any judge thereof, at all times, to amend all defects and errors in any proceedings in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and *all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.*"

The power to amend pleadings extends to the introduction of matters which the parties hoped and intended to try in the cause, and is not limited to matters within the issue upon the record. The Mayor of Hoboken *v.* Gear, 3 Dutch. 265. The effect of the statutory provisions authorizing amendments is, that every error in form, no matter how radical, can be corrected at any stage of the suit in all civil causes, whenever such correction becomes necessary to enable the parties to try the matters which they contemplated to try or to sustain the decision resulting from such trial. Price *v.* New Jersey R. R. Co., 2 Vr. 229. If an objection was technically valid, the plaintiff would have been permitted to amend his declaration by adding a special count upon the written agreement; and what the court below might have done to prevent the failure of justice this Court [of errors] will, under the statute, consider as done—the case having been tried on both sides with special reference to the agreement. Willis *v.* Fernald, 4 Vr. 206. Amendments are now

entirely in the sound discretion of the court, and will be allowed whenever the advancement of justice requires it. Each case must depend upon its own particular circumstances. Ten Eyck *v.* Delaware and Raritan Canal Co., 4 Harr. 5.

A motion for amendment may be heard at any time, and at almost any stage in the cause. Den., Hoover, *v.* Franklin, 2 South. 851; Reed *v.* Barker, 1 Vr. 379, Haines, J. After a trial and verdict. Price *v.* New Jersey R. R. Co., 2 Vr. 229. After argument in the Court of Errors. Apgar *v.* Hiler, 4 Zab. 808. After the cause had been removed to the court of errors, judgment reversed, a new trial ordered, and the record remitted. Rogers *v.* Phinney, 1 Gr. 1. When judgment on demurrer is reviewed in a court of error, the judgment given should be the same as they decide ought to have been given by the court below, that is, a judgment in the cause for the plaintiff or defendant; but the Court of Error, after reversing a judgment, may grant leave to amend instead of ordering such a judgment as ought to be given. Hale *v.* Lawrence, 2 Zab. 73.

The amendment may be made while the case is pending in error (Apgar *v.* Hiler, 4 Zab. 808) by the Court of Errors itself. 9 Vr. 439. An amendment might have been allowed at the trial, or, failing that, this court would have made it if the ends of justice required it. If the defect in the record be mere matter of form, it may be amended without intervention of the court below, or, if the verdict be faulty, the court may permit the case to stand over even after argument, to afford opportunity for amendment in the court below. Railroad *v.* Coffey. 9 Vr. 525. *The power of amendment conferred by the one hundred and thirty-eighth section extends to the Court of Errors, and in cases where no injury has been done to the party complainant by or through error of mere form, it is encumbent on this court in the interests of justice to exercise the power. Insurance Co.* v. *Day, 10 Vr. 91. If the real question in controversy between parties to an action appears to have been*

fully and fairly tried, the Court of Errors will not reverse for an objection which may be avoided by amendment of the pleading, but will, in such cases, exercise the power of amendment. Ware v. *Ins. Co., 16 Vr. 176.*

This declaration does not show in itself the names of the next of kin. They are proved in the evidence. Folio 34. It is averred "that the next of kin of said Mary Laughlin have, by reason of the premises, sustained and suffered great loss, injury and damages, to wit, the sum of $50,000." Page 8, folio 14. This allegation is substantially that there are next of kin who have sustained damage, and was held sufficient (McGlone, Admr., *v.* Railroad, 8 Vr. 305), without giving the names, and the exception was stated to be merely formal, not to justify a demurrer (page 305), and that if not sustained the declaration on motion would have been declared to have been amended, citing English cases. Page 307. The practice of the courts of New Jersey extends to a suit at law in the United States Circuit Court. A decree of the Circuit Court ought not to be reversed for defect of form in a process which is amendable. Semms *v.* United States, 91 U. S. 21. This alleged defect is merely a form which this court can disregard under section 954, Desty's Federal Procedure, pages 525, 538, 539.

II. The Judge's Charge and Refusal, as to Negligence and the Right to Recover.

The third assignment is that *the judge refused to charge "that the obligation at any time to keep a flagman at a crossing over a street or highway arises out of and depends upon the degree of danger to which persons are exposed who have occasion to cross the railroad in using the street or highway* —and that *the defendant below was not required on the day on which and at the hour at which the accident occurred to keep a flagman at the crossing where it occurred."* The last part of this is matter of fact which the judge could not charge. The first part he did charge. He did not refuse

"excepting in so far as the matters set forth in said requests were passed upon in said charge." Folio 38. At folio 41 he stated the rule that trains in going through large and populous towns and cities, and in crossing streets, should be run with much greater care and at slower rate of speed than when in open country, where there is much less travel and where they can be seen and heard from much greater distances; and on page 47 he disposes of this whole exception by charging the well-established law, "Whether the defendant is bound by statute or common law to keep one or more flagmen at a public crossing is not a material question just now, since the proof shows that the company had accustomed the public to depend upon such flagmen by employing them, and having established the custom they cannot be allowed to abandon it at their pleasure."

The eleventh assignment. This assignment is directed to this last charge. The law in this case is well established and recognized by the following cases.

The principle is stated in the American and English Encyclopedia of Law, vol. 4, p. 930, as follows:

Where a railroad company does keep a flagman at a crossing, although not required to do so by law, so long and continuously as to make his presence customary, then travelers have a right to count on his presence and care. (6)

And it is evidence of negligence on the part of the railroad company if he be temporarily absent or permanently removed without notice to the public. (7)

(6) Ernst *v.* Hudson River R. R. Co., 39 N. Y. 61.

Warner *v.* N. Y. Central R. R. Co., 45 Barb. 299.

Dolan *v.* Delaware R. R. Co., 71 N. Y. 285.

Pittsburgh R. R. Co. *v.* Yundt, 78 Ind. 373; 3 Am. and Eng. R. Cas. 385; 41 Am. Rep., 580.

St. Louis R. R. Co. *v.* Dunn, 78 Ill. 197.

See McGrath *v.* N. Y. Central R. R. Co., 59 N. Y. 468; 17 Am. Rep. 359; 63 Id. 522.

Casey *v.* N. Y. Central R. R. Co., 78 N. Y. 578.

(7) 78 Ind. 373; 78 Ill. 197; 71 N. Y. 285, as above.
Philadelphia R. R. *v.* Killipp, 88 Pa. St. 405.

The fourth exception is to the alleged refusal of the judge to charge that "*if the defendant, at the time of the occurrence in question, had a flagman at the crossing where it occurred, in a proper position, and at such a time as to give to persons in the roadway, about to cross the track, sufficient notice of the approaching train, everything that was required of the defendant was done, and that in such case the question of the speed of the train, and of signals across the sidewalks, or elsewhere, becomes immaterial.*" This was not refused. It was substantially charged as follows: "It may be remarked here that if all the precautions already mentioned were adopted and used by the defendant company in running its trains, and the necessary number of flagmen were employed at the crossing to keep the track clear, it makes little or no difference how great the rate of speed at which the train was run, provided the public had sufficient warning of its approach. If, in the face of such warning, a person ventures across the track, he will take all the risk of danger, and the company will not be liable."

The fifth exception is, that the judge refused to charge that "*the engineer of the colliding train, when said train came in sight of the crossing, and when he saw the street car standing at some distance from the railroad track, had a right to suppose that the driver of said car would not attempt to cross before said train.*" This is a question of fact, and immaterial and untrue. The important question is not whether the engineer had the right to go ahead, but whether proper signal was given to the driver. What is more, the engineer's duty is to be guided by many other circumstances than the position of the wagon. He relies on the signals of the flagman, &c., and the charge as requested would certainly have been wrong.

The seventh assignment excepts to the alleged charge "*that the jury might consider, in determining the question, whether the accident, which resulted in the death of the plaintiff's intestate, was due to the neglect of the agents of the defendant below, employed at the crossing where the collision occurred, to lower the gate bars at the sidewalks intended for the protection of pedestrians.*" What the judge said on this subject is a follows:

"3d. Whether the defendant's agents employed at the crossing to lower the gate bars at the side tracks for the protection of pedestrians, and to notify the drivers of vehicles when trains were coming, were prompt and careful in the discharge of their duties on this occasion." There is nothing in the charge as a foundation for the language of the exception, and the evidence is not printed on that point. The fact proved and insisted upon was, that there were no gates on the roadway, but that there were gates on the sidewalks, and that after the east-bound train left the station these gates were raised as an intimation that passage was clear before the horse car started.

If the judge intended to leave this to the jury he did so rightly, but there is nothing in the bill of exceptions to show what was left to the jury on this point. This assignment must fall. The judge certainly did not charge as stated in the assignment.

The eighth assignment is, that the judge charged the jury "*that the accident was due to the failure of the flagman at the crossing to show the red signal to the engineer of the approaching train.*" No such charge was made. What he said was this: "Lutz is, however, sustained in one respect. He had ceased to wave his white lantern, the signal that a train is coming, and he had left his red lantern, the signal of danger to an approaching train, at his shanty, and had no time to run and get it. It is *possible*, nay, probable, that if the red signal had been shown to the engineer of the west-bound train the accident would have been prevented."

The tenth assignment is, that the judge charged "*that it was the duty of the defendant's engineer of the colliding train to have his engine under sufficient control to check its speed, so as to avoid collision with a vehicle about to cross the tracks, as he approached the crossing.*"

This is not the judge's language. He left it to the jury to investigate this branch of the inquiry, namely, whether the speed was so high or unusual as to be negligent and reckless under the circumstances. Folio 41, page 20. He tells the jury that they may apply the test, "whether in approaching a crowded thoroughfare the engineer had his train under sufficient control to check his speed *in obedience to the signal of the flagman* so as to avoid collision." That he should have his train under sufficient control to obey proper signals in crossing a crowded thoroughfare is beyond all question, but the whole matter was left to the jury and has been determined by them.

We have dealt with these exceptions in some detail, because the conduct of the plaintiff in error in printing none of the evidence referred to by the judge makes it possible that his meaning may be misapprehended. The charge is entirely right, and the exceptions as above refer either to what he did not say or are unwarranted.

III. The Right of the Plaintiff to Substantial Damages.

The second assignment is, that *evidence was admitted to show that Mary Laughlin performed the duties of a good, capable mother toward her two children in their nurture and in their moral, intellectual and physical training.*

The sixth assignment is, that the judge refused to charge that, *notwithstanding the death of the mother, the father remained bound to provide care, nurture and education, and in estimating damages for the loss sustained by the children by being deprived of the peculiar care, education and nurture which the mother could have bestowed, the jury must take into consideration that it is the father's duty to take all proper*

means to supply such loss, and damages can only be recovered in respect of such loss as cannot be supplied by the father and others employed by him.

The ninth assignment is, that *the jury were permitted to give more than nominal damages.*

These assignments bring up the particular question whether these children have suffered any loss that can be measured by money by reason of the death of their mother. The judge's charge is contained on page 24, folios 51 and 52. The jury were instructed that there must be some pecuniary injury to the children of such a mother as Mrs. Laughlin is described to be; that difficult as it may be to estimate that loss, the jury may have to undertake it; that they are not to give compensation for the loss of a mother's love, or for the deprivation of her society and sympathy; that all associations which hallow her name must be coolly and dispassionately put aside, but that the pecuniary injury is to be ascertained. He then continues: "One mode may be to count the probable cost of obtaining an equivalent substitute. Nurses and teachers can be procured for moderate wages, but a hired nurse does not and cannot as a general rule fill the place of a devoted, patient and self-sacrificing mother. Superior instructors may be found, but they do not supply the natural watchfulness over the child's moral growth. The whole difficulty is in fixing a pecuniary value on a mother's services to her children separate and apart from the maternal love and care which she instinctively feels and exercises for them from their birth onward; but if there is any pecuniary advantage or benefit in a mother's nursing, teaching, guardianship and general watchfulness of a child's physical, mental and moral growth over the like services performed by paid substitutes, then, on the death of the mother, the child may be said to have been deprived of a reasonable expectation of a pecuniary advantage. It is a substantial and material advantage to every child to have a good and faithful mother. Common observation shows us that men

and women who have enjoyed the advantages of maternal care, instruction and influence during childhood and youth are better equipped for future usefulness and success in life than others who have been early deprived of such advantages. There are exceptions, it is true, but actual experience and probabilities all point to the same general direction. There must be some value in the prospect of such usefulness and success, and you will have to come as near to it as you can. We must repeat to you, in closing these instructions, that you must rigidly discard all sentimental feelings in relation to Mrs. Laughlin's death, and the sorrow and distress of her husband and children. The law gives no relief for these, but as practical business men, actuated by a sincere desire to do justice between these parties according to the provisions of this statute, you will calculate the value of the maternal advantages which the children of Mrs. Laughlin have lost by her death."

The law in this matter is accurately laid down by the judge in the above charge. Sustaining him are the following cases:

Tilley *v.* Hudson River R. R., 24 N. Y. 471.
S. C., a second review, 29 Id. 252.
Pennsylvania R. R. *v.* Goodman, 62 Pa. St. 329.
Stokes *v.* St. Louis, &c., Co., 31 Mo. 229.

The law of New Jersey as to the principles of decision will be found in the following cases:

Paulmier *v.* Co., 5 Vr. 156.
Telfer *v.* Co., 1 Id. 188.
Demarest *v.* Little, 18 Id. 29.

The New York case above cited went twice to the Court of Appeals, and all the points here raised were fully determined.

The New York statute allows the jury to give what sum they "deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injury

resulting from such death, to the wife, and next of kin of such deceased person." It is substantially identical with that of New Jersey.

The deceased in that case was a wife and mother of five children, four being under age. On the first trial exception was taken to the admission of evidence of her earnings and contribution to the common stock of the family, and that she taught and educated her children, and to the fact that more than nominal damages were allowed by the judge, who charged the jury to inquire what she was worth to the family above her support—what she could earn above her own support; that, although the father survived, the jury might consider the increase by her earnings to the common stock, in view of the reasonable probability that the children might inherit it, but that the plaintiff could not recover for the value of the deceased to the children in nurture and education.

After verdict and judgment for $4,000, a writ of error was taken by the defendant, and the Court of Appeals, after holding that the possibility of inheritance was too remote and granting a new trial, declare their opinion that her value to them in nurture and education should be considered on the new trial. Denio, judge, after stating that the injury to the children by her death was a ground for damages, and these not nominal, continues that the difficulty arises from the word "pecuniary," but that "it was not used in a sense so limited as to confine it to the immediate loss of money or property, for if that were so there is scarcely a case in which any amount could be recovered."

It looks to prospective "advantages of a pecuniary nature, which have been cut off by the premature death of the person from whom they would have proceeded; and the word pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most grievous and painful to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the depri-

vation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mothers, of a different kind. She owes them the duty of nurture and of intellectual, moral and physical training, and of such instruction as can only proceed from a mother. This is, to say the least, as essential to their future well-being, in a worldly point of view, and to their success in life, as the instruction in letters and other branches of elementary education which they receive at the hands of other teachers who are employed for a pecuniary compensation. Suppose a person under obligation to furnish a minor apprentice with common school instruction for a given period, would not the violation of that duty furnish a claim for damages? The injury would be of the same character which a child suffers from the loss of the training and instruction which it is entitled to receive from its parents.

"The injury in these cases is not pecuniary in a very strict sense of the word, but it belongs to that class of wrongs as distinguished from injuries to the feelings and sentiments; and in my view, therefore, it falls within the term as used in the statute. It is argued by the defendants' counsel that there should be no recovery on these grounds, because the father is obliged to provide what the children have been deprived of by the loss of their mother. But this is not an adequate answer. The children have been deprived of that which they were entitled to receive, by the wrongful act of the defendants. Their loss may or may not be made up to them from another source; but, in the meantime, they are entitled to a fair and just compensation from the wrong doers by the provisions of this statute."

Smith, judge, dissenting, thought the verdict should be sustained, and agreed that merely nominal damages should not be awarded, but approved the charge below as giving

an approximate rule for estimating the pecuniary loss, to guide the discretion of the jury, with evidence of her capacity and the value of her services in the support of the family.

Upon the new trial increased damages were recovered, and on the writ of error it was insisted that the instructions of the court as to the new trial were *obiter dicta*. The whole case was exhaustively reargued. In the decision the court do not hold the former decision conclusive and proceed to affirm it on reconsideration. On the points now at issue, the opinion is as follows (29 New York Court of Appeals 285): "The charge of the judge was explicit that the damages must be limited to pecuniary injuries, and he said that in estimating them the jury had a right to consider the loss (that is, the pecuniary loss) which the children had sustained in reference to their mother's nurture and instruction and moral, physical and intellectual training."

"It is certainly possible, and not only so, but highly probable, that a mother's nurture, instruction and training, if judiciously administered, will operate favorably upon the worldly prospects and pecuniary interests of the child. The object of such training and education is not simply to prepare them for another world, but to act well their part in this, and to promote their temporal welfare. If they acquire health, knowledge, a sound bodily constitution, and ample intellectual developments, under the judicious training and discipline of a competent and careful mother, it is very likely to tell favorably upon their pecuniary interests. These are better, even in a pecuniary or mercenary point of view, than a feeble constitution, impaired health, intellectual ignorance, and degradation and moral turpitude. To sustain the charge, it is enough that these circumstances might affect their pecuniary prospects; it was left to the jury to say whether, in the given case, they did so or not, and if so, to

what extent. It is no answer to this view to say that wealth is sometimes associated with infirm health, mental degradation and moral turpitude. Cases of this kind do occur, but they do not make the rule, nor tend to show that the healthy growth and expansion of the physical, intellectual and moral powers with which a kind providence has endowed us, do not tend to our worldly advantage.

"I do not understand from the phraseology of the statute, that an extremely nice and contracted interpretation should be put upon the term 'pecuniary injuries.' A liberal scope was designedly left for the action of the jury; they are to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule; within the limit of the statute, as to amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted; if so satisfied, they are at liberty to allow them, from whatever source they actually proceeded, which could produce them. If they are satisfied, from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care, or intellectual culture, or moral training, which the mother had before supplied, they are at liberty to allow for it.

"The statute has set no bounds to the sources of these pecuniary injuries. If the rule is a dangerous one, and liable to abuses, the legislature, and not the courts, must apply the corrective.

"The charge is supposed to have been particularly objectionable, because it set before the jury moral training and culture as one of the sources of pecuniary benefit, which the jury were at liberty to consider. It would be an effectual, though technical, answer to this exception, to say that the charge was not objected to specifically on that ground, and that if the charge is sustainable on the score of physical and mental training supplied by the mother, it

cannot be rejected as erroneous, because, in the same sentence, moral culture was included without a specific objection. But I think it defensible on the grounds already advanced, that moral culture, like bodily health and mental development, improve and perfect the man, and fit him not only for a more useful but a more prosperous career—for the worldly success as well as social consideration. It is not essential to show that they necessarily result in direct pecuniary advantage; it is sufficient that they may do so; that they often do so; that it is possible, and not improbable, that such may be the result, and that, therefore, these items may be set forth and presented for the consideration and deliberation of the jury, to be diposed of as they shall deem to be just. I think the exception is not well taken, if they may possibly result in pecuniary benefit and do not tend in a contrary direction. I concede these are quite general, and to some extent loose and indefinite, elements to enter into a safe and judicious estimate of actual pecuniary damage, but I am unable to find in the statute a restriction which shall confine it within narrower limits. * * *

"Nor do I think it was erroneous to instruct the jury, that while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin, in consequence of the death of Mrs. Lilley, they were not limited to the losses actually sustained at the precise period of her death, but might include also prospective losses, provided they were such as the jury believed, from the evidence, would actually result to the next of kin as the proximate damages arising from the wrongful death.

"If damages of the character alluded to, to wit, those arising from the deprivation of the training and education which the parent would bestow, were allowable at all, the loss which the children would sustain by the death must necessarily be such as should arise from the nurture and training to be subsequently bestowed. That which had been already given, and of which the children had already

reaped the benefit, could not be increased by the continued life of the parent, nor curtailed by her sudden death; the result had already been realized. But her sudden and wrongful removal was the withdrawal—the permanent and perpetual withdrawal—of a moral and intellectual fund from which the children were constantly deriving pecuniary aliment and support. And it is this withdrawal which formed the basis for the whole allowance for any damage arising from this source. The length of time such benefit would have been enjoyed was left to the jury under proper instructions. They were charged to find it from the evidence; they were charged to limit the recovery to such damages as would actually result, and to such damages as were proximate, and not remote."

We have quoted this opinion very fully as being the now long settled rule after full discussion and reargument.

In Illinois C. R. *v.* Barson, 72 U. S. 90, Mr. Justice Nelson negatived the argument of the plaintiff in error, urging that damages should be nominal because the next of kin had no legal claim on their mother for support—an argument, he says, frequently made and always overruled. It may be added, that if the father died the mother would be obliged to support her children, if of sufficient ability. Rev. (N. J.) 843, § 30.

In Pennyslvania R. R. Co. *v.* Goodman, 62 Pa. St. 329, the suit was under a statute allowing a husband to recover pecuniary damage for death of the wife. The judge charged that loss of her "services and companionship," "their value in the pecuniary sense," were the subject of damages—not nominal merely, but they should be a "just compensation for the value of the companionship and services lost." On appeal (page 339) this charge was held sound—as referring to companionship, not by way of solace, but the value of services as wife and companion, the loss measured by the nature of the service, characterized as it was by the relation in which the parties stood.

"Certainly, the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention and tender solicitude of a wife and mother of children surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value."

In Paulmier *v.* Co., 5 Vr. 156, the Supreme Court of New Jersey expressly decided that it was of no consequence whether the deceased was *obliged* to support the next of kin or not in estimating what pecuniary benefit they would have had from the continuance of the life of the deceased.

In Demarest *v.* Little, 18 Vr. 31, where the next of kin were of mature age—two sons, self-supporting, and a daughter married—it was conceded that the father might, "by advice as to business affairs, be of pecuniary benefit. But whether such an anticipation be reasonable or not must depend on the circumstances. Considering the age, the assured position, the business and other relations of these children, it is obvious that the probability of any pecuniary advantage to accrue to them in these modes was very small."

See, also, Telfer *v.* Co., 1 Vr. 188.

It appears by the case (pages 13, 14) that a motion for new trial was made after the verdict, upon the ground that the damages were excessive; that upon that motion defendant succeeded unless the plaintiff should release all of the verdict above $10,000, and that such release was made.

The statutes of New Jersey provide (Rev., p. 887, pl. 246) as follows: "Where the party holding a bill or bills of exceptions applies for a rule to show cause why a new trial should not be granted, the granting thereof shall be a waiver of all bills of exceptions except on points expressly reserved